IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 814

THE STATE TAX COMMISSION OF UTAH,

Petitioner,

vs.

MALCOLM P. ALDRICH and MARY S. HARKNESS, Administrators with the will annexed of the Estate of Edward S. Harkness, Deceased,

Respondents.

BRIEF FOR RESPONDENTS

MELBER CHAMBERS,
Counsel for Respondents.

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Respondents.

BRIEF FOR RESPONDENTS

The question presented for review is whether upon the facts in this case the State of Utah could, without violation of the Fourteenth Amendment, tax the testamentary transfer of the shares of stock in the Union Pacific Railroad Company, a Utah corporation, taking place upon the death of the shareholder, Edward S. Harkness, who died a resident of the State of New York.

Statement of the Case

There is no issue of fact in this case.

The statement of the case contained in the petitioner's brief is correct as far as it goes, but it is incomplete. Only the additional facts will be stated here.

The decedent was never domiciled in Utah and never carried on any business in that state (R. 3).

The certificates representing the shares of Union Pacific stock in question were always kept in New York and were never used in connection with any business carried on by anyone in Utah (R. 3).

While the shares of stock were registered in the decedent's name, as stated in the petitioner's brief, the books of the Union Pacific Railroad Company which contained the record of that ownership were at all times kept in New York. Indeed, the only stock books and stock records kept by the Railroad Company had been located in New York for many years. In that state was the only office for the transfer of its shares of stock (R. 2). It has of course been within the power of the Railroad Company to keep stock books in Utah and record transfers there, but it has not done so and there is no requirement in the law of Utah that it do so (R. 2, 14).

Although the Union Pacific is a Utah corporation and holds its annual meeting of stockholders there, its executive offices are located in New York and its Board of Directors meets there. Only a very small portion of its property is in Utah; less than ten per cent. of its revenue comes from business transacted in Utah; less than nine per cent. of its trackage is in that state (R. 2).

In connection with the credit allowed by the State of New York against the estate tax paid to it, the New York tax authorities have taken the position that a tax such as the one here in question is not constitutionally valid and that consequently no credit is allowable against the New York tax assessed against the Harkness estate (R. 4).

SUMMARY OF ARGUMENT

POINT I. The nature and scope of the Utah Inheritance Tax Law.

POINT II. Antecedents of *First National Bank* v. *Maine*.

POINT III. The question presented in the case at bar has already been decided by this Court in *First National Bank* v. *Maine*.

I. Consideration of that decision.

II. Reliance upon that decision by Federal and State courts.

POINT IV. The authority of *First National Bank* v. *Maine* stands unimpaired by later decisions of this Court.

1. That decision has not been overruled.
2. Its citation by this Court as an authority.
3. The later decisions relied on by petitioner considered and distinguished.

POINT V. No principles have been enunciated by this Court which cast doubt on the soundness of the decision in *First National Bank* v. *Maine*.

POINT VI. The Uniform Stock Transfer Act and the trend of modern decisions apart from that Act adopting the mercantile concept of shares of stock are additional reasons for applying the decision in *First National Bank* v. *Maine* to the case at bar.

POINT I

The Nature and Scope of the Utah Inheritance Tax Law

Respondents concede that the Utah tax in question is an estate or transfer tax and that the provisions of the tax statute were intended to be broad enough to reach shares of stock of Utah corporations owned by non-resident decedents. Consequently, if the State of Utah could constitu-

tionally tax the testamentary transfer of the shares of the Union Pacific Railroad Company owned by Mr. Harkness, it has done so by its Inheritance Tax Law in effect at the time of his death.

POINT II

Antecedents of First National Bank *v.* Maine

I

The problem of the scope of the state's power to tax has engaged the attention of this Court since the early days of the Republic. Long before the coming of the Fourteenth Amendment the Court considered the nature and extent of the right of taxation which was an incident of state sovereignty (*McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316 (1819). It was pronounced by Chief Justice Marshall that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation" (id. p. 429). For a time after the ratification of the Fourteenth Amendment in 1868 this Court still described unacceptable tax statutes as attempting an extra-territorial effect. Thus there was the oft-quoted passage from *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300, decided in 1872:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. * * * Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. * * *. The bonds issued by the railroad company in this case are undoubtedly property, but property in

> the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The Law * * * is not, therefore, a legitimate exercise of the taxing power."

Soon after the turn of the century, however, the due process clause began to appear in the opinions of this Court, as it outgrew its narrow Civil War significance. Excess in the exercise of a state's taxing power was said to violate the due process clause in the Fourteenth Amendment.

Louisville, etc. Ferry Co. v. *Kentucky*, 188 U. S. 385 (1903);

Delaware L. etc. RR Co. v. *Pennsylvania*, 198 U. S. 341 (1905).

Both as respects property taxes and inheritance taxes it came to be held that the subject of the tax had to be within the state. The situs of the property had to be in the taxing state.

Rhode Island Hospital Trust Co. v. *Doughton*, 270 U. S. 69, 80 (1926).

Underlying the requirement of situs was not only the idea that the state's power ceased at its borders but also the concept that any tax is based upon something given by the taxing authority in return for the tax. The *quid pro quo* for the tax is the protection and other benefits given to the property or the person taxed. (See *Union Transit Co.* v. *Kentucky*, 199 U. S. 194).

About the situs of real property there was never any question. Its situs was fixed. Thus it has always been recognized that a state may not lay a property or an inheritance tax upon land situated outside of the state.

Senior v. *Braden*, 295 U. S. 422, 429 (1935);

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, 208 (1936);

See *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204 (1905).

About tangible personal property there was at first some doubt in the decisions of the various state courts where the question arose. The maxim *mobilia personam sequuntur* was for a time thought to exclude tangible personal property from the taxing jurisdiction of the state where it had acquired a permanent location. But this Court settled the question many years ago and held that tangible personal property might be subjected to taxation by the state where it was situated, that is, by the state of the situs of the property.

Brown v. *Houston*, 114 U. S. 622 (1885);
American Steel & Wire Co. v. *Speed*, 192 U. S. 500 (1904).

It was of course intangible personal property which caused the real difficulty. Where was it taxable? And with the great growth in the complexity of living and the creation of new forms of intangible property, the perplexity of the problem increased apace.

At first, applying the maxim *mobilia*, the taxable situs of intangibles was fixed at the domicile of the owner.

Kirkland v. *Hotchkiss*, 100 U. S. 491 (1879).

Thus far in the development of the jurisdiction of the states to tax there was no question of double taxation. Tangibles were taxable where they were physically located. Intangibles were taxable at the domicile of their owner.

Then came the first exception to the application of the maxim *mobilia*. That was in the cases of business situs. When an intangible became connected with a business at some other place than the domicile of the owner, it was said to have acquired a taxable situs there.

New Orleans v. *Stempel*, 175 U. S. 309, (1899);
Bristol v. *Washington County*, 177 U. S. 133, (1900);
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395, (1907);

Buck v. *Beach*, 206 U. S. 392, (1907);
Liverpool Ins. Co. v. *Orleans Assessors*, 221 U. S. 346 (1911).

This was followed by a recognition of a taxable situs at the place where a bond or note was permanently kept, even if that place was not the domicile of either the debtor or the creditor. So those intangibles represented by specialties were to that extent treated as chattels.

Wheeler v. *Sohmer*, 233 U. S. 434 (1914);
See *New Orleans* v. *Stempel*, 175 U. S. 309, 322 (1899).

A debt had been held to have a taxable situs also at the domicile of the debtor.

Blackstone v. *Miller*, 188 U. S. 189 (1903).

So, by 1914 a debt in the form of a bond or note had been held to be subject to taxation in three places: domicile of the creditor, domicile of the debtor, and place where the specialty was permanently kept.

Shares of stock fared no better. A taxable situs was found for them at the domicile of the owner, in the state of incorporation, and in the state of business situs.

Hawley v. *Malden*, 232 U. S. 1 (1914);
Frick v. *Pennsylvania*, 268 U. S. 473 (1925);
See *New Orleans* v. *Stempel*, *supra*.

The specific application of the business situs principle to shares of stock was made later in *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234 (1937). If the corporation were incorporated in more than one state, then more than three states presumably could tax the shares. *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 136 Atl. 66 (1927).

The realization by this Court of the injustice and oppression caused by this multiplicity of taxes gave rise to

an interpretation of the due process clause of the Fourteenth Amendment which sought to limit taxation to a single state unless a compelling reason should justify otherwise.[1]

As we have seen, the problem never arose in connection with land for it was always regarded as taxable only by the state where it was situated.

By 1905 this Court had definitely restricted the taxable situs of tangible personal property to one state. If it be permanently located[2] in a particular state, then it is subject to a property or transfer tax in that state alone.

Union Transit Co. v. *Kentucky*, 199 U. S. 194 (1905);
Frick v. *Pennsylvania*, 268 U. S. 473 (1925);
City Bank Farmer's Trust Co. v. *Schnader*, 293 U. S. 112 (1934);
Sancho v. *Humacao Shipping Corporation*, 108 F. 2d, 157 (C. C. A. First Cir. 1939), cert. denied, 310 U. S. 641 (1940).

If tangible personal property be not permanently located in any state, then it may be taxed at the domicile of the owner.

Southern Pacific Company v. *Kentucky*, 222 U. S. 63 (1911);
New York Central R.R. v. *Miller*, 202 U. S. 584 (1906);
See *Johnson Oil Co.* v. *Oklahoma*, 290 U. S. 158, 161 (1933).

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[1]This interpretation developed even though there are found in some of the opinions of this Court the statement that the Fourteenth Amendment does not forbid double taxation. See for example, the cases referred to on pages 15 and 16 of petitioner's brief.

[2]The presence in the state must have some permanence; it cannot be merely temporary. *Hays* v. *Pacific Mail S. S. Co.*, 17 How. (U. S.) 596 (1854); other cases collated in 28 Yale L. J. 525.

Thus it is only when tangible personal property acquires a taxable situs elsewhere that the state of the owner's domicile may not tax it. It seems clear, therefore, that underlying the decisions of this Court dealing with tangible property is the principle that under the due process clause tangibles and the transfer of tangibles may be taxed only in one state.

The time came in 1930 when the principle against double taxation was applied to four kinds of intangibles: bonds, notes, bank deposits and credits.

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204 (1930);
Baldwin v. *Missouri*, 281 U. S. 586 (1930);
Beidler v. *South Carolina Tax Comm.*, 282 U. S. 1 (1930).

In *Farmers Loan & Trust Co.* v. *Minnesota, supra*, a New York decedent owned and kept in that state negotiable bonds and certificates of deposit issued by the State of Minnesota and certain cities in that state. Some were registered, others were payable to bearer. None had any connection with any business carried on in Minnesota. All passed under the decedent's will which was probated in New York, where his estate was administered and where a tax was paid upon the testamentary transfer.

Minnesota assessed an inheritance tax upon the same transfer. The executor claimed that such a tax conflicted with the Fourteenth Amendment.

This Court held that the bonds and certificates of deposit had acquired a permanent situs for taxation in New York and that their testamentary transfer was taxable there but not in Minnesota. In doing so, it said (pp. 209, 211-212):

> "But it is said the obligations were debts of Minnesota and her corporations, subject to her control; that her laws gave them validity, protected them

and provided means for enforcing payment. Accordingly, counsel argue that they had situs for taxation purposes in that State and maintain the validity of the challenged assessment."

* * * * *

"While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co.* v. *Kentucky, supra,* declared—'* * * in view of the enormous increase of such property (tangible personality) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt (it) at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy

> an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The present Chief Justice, who concurred in the result, felt that it was enough to uphold the decision that the transfer was effected in New York by one domiciled there. The privilege taxed, he pointed out, was not enjoyed in Minnesota and hence could not be taxed there. We shall advert to his concurring opinion when treating a different approach to our problem (Point III, *infra*).

In *Baldwin* v. *Missouri*, 281 U. S. 586, *supra*, the court held that cash deposited in Missouri banks, bonds and notes physically present in Missouri, some of which were secured by mortgages on Missouri land, were not subject to an inheritance tax in Missouri when their owner died a resident of Illinois.

In *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, *supra*, this Court held that the transfer of an indebtedness owing to an Illinois decedent by a South Carolina corporation was not subject to taxation in South Carolina. It was pointed out that the transfer of the indebtedness had been properly taxed in Illinois, the domicile of the decedent and was not subject to a second tax at the domicile of the debtor. The decision was unanimous, Mr. Justice Holmes and Mr. Justice Brandeis acquiescing on the ground that the *Farmers Loan & Trust Company* and *Baldwin* cases sustained the result.

Thus was the stage set for *First National Bank* v. *Maine*, 284 U. S. 312, which came to this Court in 1931. In view of the unmistakable trend of the decisions, counsel for a decedent for the first time contended in this Court that the state of incorporation was without power to tax the transfer.

of shares of stock in a domestic corporation owned by a non-resident decedent. The contention was upheld. The principle against double taxation, the taxation of the same event in two States, was applied to shares of stock.

II

Before considering the decision in *First National Bank* v. *Maine*, let us pause to reflect upon the jurisdiction being exercised by this Court and the pattern of due process which the decisions already referred to were fashioning.

For some years many have felt that underlying all of the provisions of the Constitution and its Amendments is the fundamental concept that in the creation of the Union there was a delegation to the central government by the states and their peoples of sufficient power to enable it to deal effectively with problems national in scope. What those problems would be, only the developments of time and the onward march of progress would determine. During the past decade we have seen radical changes in the view as to what are properly to be regarded as national problems. Whether the delegated power would have to be exercised by the Congress, by the Executive or by the Supreme Court would be determined by the character of the problem.

The test of whether a problem is national in scope is whether or not it may be effectively dealt with by the states. If there is a substantial conflict of interest, if the various states compete for benefits to the detriment of other states and their peoples, then the national government must intercede for the protection of its citizens.

Each of the states upon joining the Union yielded some part of its sovereignty. So much of its taxing power and so much of all the rest of its power was surrendered as was necessary to permit the formation of a family of states.

The due process clause of the Fourteenth Amendment, we submit, gives expression to that self-abnegation.[3]

In that Amendment is found the delegation to the Federal Government of the power to require the states to keep within the bounds of decency and fairness. In it was the recognition that every citizen of the United States has something more than his rights flowing from citizenship of his own state. By virtue of being a citizen of the United States he gains the protection of his national government against oppression, and against arbitrary or unfair treatment by his own or any other state.

In the words of this Court in its opinion in *Burnet* v. *Brooks*, 288 U. S. 378, 401:

> "* * * Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the State to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. * *"

If this doctrine is applied to the power to tax, it will be found that the states retain ample power to tax for the benefits they confer. As we have seen, it has long been recognized that a tax may be laid on land or on the transfer of land only at its situs. For any other state to tax would be oppressive. For less long, but for at least seventeen years, it has been recognized that a tax may be laid on tangible personal property or the transfer of it only at its situs. For any other state to tax would be an oppressive burden on its owner.

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[3]The time has passed when one may argue that the due process clause of the Fourteenth Amendment imposes no restriction on the taxing power of the states (see Petitioner's brief, pp. 18-19). *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, 80, 81 (1938) and cases cited.

It does not help explain the decisions to say that in the case of land or tangibles it is only in the state of their situs that they receive protection. Surely in the last analysis it is the owner of the property who is taxed—either because of his ownership or his exercise of the privilege of transfer.[4] So it might well be argued that in his enjoyment of his ownership, he derives benefits from not only the state of situs but also the state of his domicile. The state of situs gives police protection and other benefits, but the state of his domicile gives him an orderly society without which he could not enjoy the ownership of his property no matter where it might be located. So, unless we accept some other principle, we must permit the state of domicile to tax land and tangibles and the transfer of them though located elsewhere, as well as permit taxation at their situs. But this Court has definitely decided that the state of domicile may do no such thing.

The other principle is the one accepted as to land and tangibles and as to the four kinds of intangibles in the cases already referred to. That principle is the principle against double taxation.

In the application of that principle intangibles should be placed upon a parity with tangibles. Let them be taxable at the domicile of their owner and there alone unless they acquire a business situs elsewhere. If they acquire a business situs, then let the state of domicile yield to the state of business situs. That is the direction the decisions of this Court were taking when *First National Bank* v. *Maine* was decided. The decision in that case applied the principle to shares of stock and was, we submit, eminently sound.

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[4]This was observed by Mr. Justice Holmes, dissenting, in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, 97 (1929), when he said: "Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact."

POINT III

The question presented in the case at bar has already been decided by this Court in First National Bank v. Maine.

I

The identical question presented here was decided by this Court in *First National Bank* v. *Maine*, 284 U. S. 312 (1932).

In that case an appeal was taken by the executors of an estate from a judgment of the Supreme Judicial Court of Maine sustaining a succession tax imposed by the State of Maine upon shares of stock in a Maine corporation owned by a non-resident decedent.

The decedent died testate, a resident of Massachusetts. The greater portion of his estate consisted of shares of stock in the Great Northern Paper Company, a Maine corporation, which had most of its assets in Maine. His will was probated in Massachusetts where an inheritance tax of $32,000 was assessed and paid upon the net estate. Ancillary administration was taken out in Maine and an inheritance tax of $62,000 was assessed there upon the transfer of the shares of the Great Northern Paper Company with a credit upon this amount for the tax paid in Massachusetts. Upon these agreed facts the State of Maine brought an action of debt which was referred for final decision to the Supreme Judicial Court, sitting as a law court.

Revised Statutes of Maine, c. 69, § 1, then in force, provided in part:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, * * * shall be subject to an inheritance tax for the use of the state as hereinafter provided * * *"

Section 25 of the same chapter in substance provided that as to transfers of stock in a Maine corporation owned by non-residents the tax should be paid at the time of the transfer.

The Maine court held that the shares of stock were "within its [the state's] jurisdiction and subject to an inheritance tax * * * regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state", without thereby infringing the due process clause of the Fourteenth Amendment.

This Court reversed the decision of the Maine court and held the tax to be unconstitutional. In doing so it decided first, that only one state could, within the provisions of the due process clause of the Fourteenth Amendment, assess a tax upon the testamentary transfer of the shares of stock in question and second, that the state with the requisite jurisdiction to impose the tax was the state of the decedent's domicile.

After a review of its earlier decisions defining the jurisdiction of the states to tax testamentary transfers, this Court said (p. 326):

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

The three cases referred to were *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586, and *Beidler* v. *South Carolina Tax Comm.*, 282 U. S. 1, which we have already discussed at pages 9 to 11 of this brief.

With that prelude the Court proceeded to hold that the rule of immunity from taxation by more than one state is broader than the applications thus far made of it and that shares of stock constitutionally can be subjected to a death transfer tax by only one state.

The basis given for the application to death taxes of the rule of immunity from taxation by more than one state was this (p. 327):

> "A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states."

The remaining question was: in which state does the taxable event occur? As to that this Court said (pp. 328-329):

> "* * * In the case of tangible personality, the solution is simple: the transfer, that is, the taxable event, occurs in that state where the property has an actual *situs*, and it is taxable there and not elsewhere. In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual *situs*. But it must be solved unless gross discrimination between the two classes of property is to be sanctioned; and this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim *mobilia sequuntur personam*. *Farmers Loan Co.* v. *Minnesota, supra*, at pp. 211-212; *Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Comm., supra.*
>
> This ancient maxim had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him

on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded to the law of the place where the property is kept and used. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Eidman* v. *Martinez*, 184 U. S. 578, 581; *Union Transit Co.* v. *Kentucky, supra*, 206. But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to the class of property. *Blodgett* v. *Silberman, supra*, 9-10; *Farmers Loan Co.* v. *Minnesota, supra*, 211; *Union Transit Co.* v. *Kentucky, supra*, 206.

The considerations which justify the application of the fiction embodied in the maxim to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits, apply, with substantially the same force, in respect of corporate shares of stock. And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. * * *"[5]

Thus, at least as between the state of the decedent's domicile and the state of incorporation, it was held that the testamentary transfer of the shares is taxable by the state of the decedent's domicile.

Although the present Chief Justice concurred in the decisions of the *Farmers Loan & Trust Company, Baldwin* and *Beidler* cases, he wrote a dissenting opinion, in which Jus-

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[5]Although we would always prefer to avoid fictions, still we may hesitate to discard *mobilia personam sequuntur*, said to be a maxim as old as the law itself. *Monidah Trust* v. *Sheehan*, 45 Mont. 424, 123 Pac. 692 (1912). Shares of stock themselves are the creatures of a more recent fiction: a legal entity, the corporate fiction, now inextricably woven into our economic structure.

tices Holmes and Brandeis concurred, in *First National Bank* v. *Maine*. He felt that the earlier decisions did not require the decision announced by the majority. He also felt that the terms of the majority opinion were too broad in any event because their dictum "would sweep away all power to impose any form of tax with respect to the shares of a domestic corporation if owned by non-residents" (p. 333).

Of course in the case at bar the Respondents need only urge the validity of the decision in *First National Bank* v. *Maine*, not its dicta or implications. As to a tax on the testamentary transfer of the shares we do urge that the decision is sound.

It had been urged by counsel in that case, as it is now urged by counsel for the petitioner, that there was a real distinction between bonds and stock and that even though the state of domicile alone could tax the testamentary transfer of bonds, there should be no restriction on the right of the state of incorporation to tax the testamentary transfer of shares of stock (Petitioner's Brief, p. 26). The argument was rejected in these words (pp. 327-328):

> "A distinction between bonds and stocks for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect of the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing, for the most part, the same or like characteristics, may be subjected to contrary rules in that regard."

While, as petitioner has pointed out, dissimilarities do exist, so also do similarities.

Corporate bonds undoubtedly have some relationship to the jurisdiction of the state of incorporation. The corporate debtor issued the bond under powers derived from the state which gave it its Charter. The obligation is pro-

tected by its law. In case of insolvency the rights of the creditor would be determined by that law. In case of enforcement of the obligation the state of the debtor's domicile would give the best relief. If the bonds should be secured by a mortgage on land within the state, as it was in *Baldwin* v. *Missouri*, 281 U. S. 586, the creditor would resort to the law and the courts of that state to realize on his security in case of default.

Corporate stock also possesses some elements essentially local to the state of incorporation. That state breathed life into the corporate being; under its laws the stock was conceived and delivered. To enforce his rights in connection with the internal affairs of the corporation, the shareholder would resort to the laws of that state. To realize upon his share in the assets of the corporation on its dissolution, the shareholder would rely upon the laws and courts of that state just as the bondholder would come into the state to realize upon his interest in the mortgage security of his bond upon default.

But whatever relationship exists between a bond and a share of stock on the one hand and the state of the debtor's domicile or the state of incorporation on the other hand, there is no relationship at all between the testamentary transfer of either a bond or a share of stock and the state of the debtor's domicile or state of incorporation.

It is a tax on the testamentary transfer of the shares of stock and not a property tax on the shares themselves that concerns us. A state might well create and give protection to intangible property rights and yet have nothing to do with their transfer upon the death of the owner. That is precisely what happened in the case at bar and in *First National Bank* v. *Maine*.

In the case at bar Mr. Harkness died a resident of New York. Neither he nor his shares ever "resided" in Utah or was ever connected with any business in Utah. His will was probated in New York. There the succession took place. As a practical matter, too, the shares are transferable on the books of the company in New York. No transfer books have been maintained in Utah. Thus the

transfer, the thing sought to be taxed by Utah, was effected in New York by the death of one domiciled there and is controlled by its law.

Once created, the shares had acquired the incident of transferability on the death of the owner. That incident could not thereafter be impaired by Utah. Its transfer on the owner's death would take place wherever he was domiciled at the time of his death and would be effected by the law of that place, unaided by the law of Utah. This is conceded by the petitioner. On page 62 of its brief we find:

> "Respondents also may argue that the laws of the State of New York govern the devolution of and succession to the personal property in this case by reason of the fact that the decedent was a resident of New York. With that proposition we do not quarrel. We admit that the laws of the State of Utah can have no bearing upon the right to succession, the degrees of succession, or other determinative factors in connection with the probate of personal property belonging to this decedent's estate."

The present Chief Justice, writing in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, upon the taxability by Minnesota of the transfer of bonds issued by that State but owned by a New York decedent, accurately described the situation likewise presented by a transfer of shares of stock, when he said (pp. 214-215):

> "* * * So far as the transfer, as distinguished from the contract itself, is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. See *Bullen* v. *Wisconsin*, 240 U. S. 625, 631; *Russell* v. *Grigsby*, 168 Fed. 577; *Lee* v. *Abdy*, 17 Q. B. Div. 309; *Miller* v. *Campbell*, 140 N. Y. 457, 460; *Spencer* v. *Myers*, 150 N. Y. 269. Once the bonds had passed beyond the state and were acquired by an owner domiciled elsewhere, the law of Minnesota neither protected, nor could it withhold the power of transfer or prescribe its terms.
>
> In the light of these considerations, granting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that

law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota."

We therefore submit that there is no valid reason why shares of stock should not receive the same treatment as the other choses in actio. dealt with in the three earlier cases.

II

The decision in *First National Bank* v. *Maine* has been accepted as establishing the principle of constitutional law that the state of incorporation may not tax the testamentary transfer of shares of stock in domestic corporations owned by non-resident decedents.

Moses v. *Read*, 63 F. (2d) 16 (C. C. A. 3rd) (1933);
First Nat'l Bank of Boston v. *Comm. of Int. Rev.*, 63 F. (2d) 685 (C. C. A. 1st) (1933);
City Bank Farmers Trust Co. v. *Bowers*, 68 F. (2d) 909, 912 (C. C. A. 2nd) (1934);
Igleheart v. *Comm.*, 77 F. (2d) 704 (C. C. A. 5th) (1935);
Smith v. *Ajax Pipe Line Co.*, 87 F. (2d) 567 (C. C. A. 8th, dictum) (1937);
Nevin v. *Martin*, 22 F. Supp. 836 (D. C., N. J.) (1938);
City Bank Farmers Trust Co. v. *Schnader*, 8 F. Supp. 815, 817; (E. D., Pa.) (1934);
Zahn's Exc'r. v. *State Tax Comm.*, 243 Ky. 167, 47 S. W. (2d) 925 (1932);
Matter of Lagergren, 276 N. Y. 184, 11 N. E. (2d) 722 (1937);
Baker et al. v. *State*, 186 Minn. 160, 242 N. W. 697 (1932);
Kittredge v. *Boyd, State Treas. et al.*, 136 Kan. 691, 18 Pac. (2d) 563 (1933).

POINT IV

The authority of First National Bank *v.* Maine stands unimpaired by later decisions of this Court.

1. *First National Bank* v. *Maine* has been neither overruled nor disapproved in any subsequent decision of this Court. Until now the question presented in the case at bar has not been before this Court since *First National Bank* v. *Maine*.

2. That decision has been repeatedly referred to in the opinions of this Court in later cases as setting forth the law of the land as to the jurisdiction of the states to impose death taxes on shares of stock.

The case has been cited by this Court as an authority in the following cases:

Lawrence v. *State Tax Comm.*, 286 U. S. 276, 280 (1932);
Burnet v. *Brooks*, 288 U. S. 378, 400 (1933);
City Bank Farmers Trust Co. v. *Schnader*, 293 U. S. 112, 116 (1934);
Senior v. *Braden*, 295 U. S. 422, 432 (1935);
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, 209 (1936);
New York ex rel. Whitney v. *Graves*, 299 U. S. 366, 372 (1937);
New York ex rel. Cohn v. *Graves*, 300 U. S. 308, 315 (1937);
Worcester County Trust Co. v. *Riley*, 302 U. S. 292, 298 (1937);
Guaranty Trust Company v. *Virginia*, 305 U. S. 19, 22 (1938);
Curry v. *McCanless*, 307 U. S. 357, 363 (1939).

In *Burnet* v. *Brooks*, *supra*, while restating the distinction between the limitations of state jurisdiction to tax and the broad authority of the Federal Government, the Court

expressly approved the decision in *First National Bank* v. *Maine*, saying (pp. 400-401):

> "* * Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the Federal Government.
>
> The argument is specious, but it ignores an established distinction. Due process requires that the *limits of jurisdiction* shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co.* v. *Minnesota*, *supra*, the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): 'The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws.' It was this 'rule of immunity from taxation by more than one State,' deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine*, *supra*, p. 326."

In *City Bank Farmer's Trust Co.* v. *Schnader*, 293 U. S. 112, *supra*, this Court again unanimously affirmed the principal of the decision. It said (p. 116):

> "* * As the transfer cannot be subjected to taxes imposed by more than one state (*Frick* v. *Pennsylvania*, 268 U. S. 473, 488-492. *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 93. *Farmers Loan & T. Co.* v. *Minnesota*, 280 U. S. 204, 210. *First National Bank* v. *Maine*, 284 U. S. 312, 326-327), Appellant framed its complaint to call for a decision whether Pennsylvania or New York is entitled to the tax. * *"

In *Senior* v. *Braden*, 295 U. S. 422, *supra*, while distinguishing a case the Court said (p. 432):

> "The opinion accepted and follows the doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, and *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Those cases were disapproved by *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204. They are not in harmony with *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, and views now accepted here in respect of double taxation. See *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312."

In 1936 the decision was again approved in *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, *supra*, in these words (p. 209):

> "* * When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 211. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,'

we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.' Id., p. 212. The principle thus announced in *Farmers Loan & Trust Co.* v. *Minnesota* has had progressive application. *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312, 328, 329. * *"

In *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366, *supra*, an income tax at the business situs was upheld under the recognized exception to the rule of taxation of intangibles at the owner's domicile. Citing *First National Bank* v. *Maine* with approval, this Court said (pp. 371-374):

"The relator's argument is that the membership in the Exchange is intangible personal property, that as a general rule property of that sort is taxable only at the domicile of the owner, and that unless the membership has a 'business situs' in New York it is not taxable there. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1, 8; *First National Bank* v. *Maine*, 284 U. S. 312, 329, 331; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 209-211. He contends that the membership cannot be said to have a business situs in New York because he and his copartners reside and transact all their business in Massachusetts."

* * * * *

"We think that the dominant attribute of relator's membership in the New York Stock Exchange so links it to the situs of the Exchange as to localize it at that place and hence to bring it within the taxing power of New York. Accordingly we hold that in laying the tax upon the profits derived by the relator from the sale of the right appurtenant to his membership the State did not exceed the bounds of its jurisdiction. * *"

Upholding a New York Tax on rents received by a resident from land situated in another state, this Court in

New York ex rel. Cohn v. *Graves*, 300 U. S. 308, *supra*, pointed out that such a tax did not fall within the principle against double taxation. It said (pp. 314-315):

> "It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co.* v. *Virginia, supra; Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicil, irrespective of the location of the land, and that the state court rightly upheld the tax."

In *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, *supra*, it was said (p. 298):

> "* * This Court has held that state statutes, construed to impose death taxes upon the intangibles of decedents domiciled elsewhere, infringe the Fourteenth Amendment, and it has accordingly reversed judgments of state courts enforcing such liability. *First National Bank* v. *Maine, supra; Farmers Loan & Trust Co.* v. *Minnesota, supra.* * *"

In *Guaranty Trust Co.* v. *Virginia*, 305 U. S. 19, *supra*, this Court upheld a Virginia tax on income received by a resident from a trust established and administered in New York where also the income was taxed. *First National Bank*

v. *Maine* was referred to with approval but held not to be inimical to the challenged tax. This Court said (pp. 22-23):

> "The insistence is that the challenged assessment was upon the identical income already rightly taxed by New York; that, under numerous decisions by us, two or more states may not tax the same subject; this would amount to double taxation and infringe the Due Process clause. To support this proposition the cases noted in the margin are cited [including *First National Bank* v. *Maine*].
>
> Those cases go upon the theory that the taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, and *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. The attempt to draw a controlling distinction between them and the present cause, we think, has not been successful."

In *Curry* v. *McCanless*, 307 U. S. 357, *supra*, and *Graves* v. *Elliott*, 307 U. S. 383 (1939), the majority of this court in two five-to-four decisions held that an inheritance tax might be imposed on intangibles by a state in which a decedent had placed them in a trust, as well as by the state of the decedent's domicile. Thus it was decided that not every case would permit the application of the single tax rule.

The present Chief Justice, writing for the majority, said (pp. 367, 373):

> "In cases where the owner of intangibles confines his activity to the place of his domicile it has been found convenient to substitute a rule for a reason, cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313; *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 241, by saying that his intangibles are taxed at

their situs and not elsewhere, or, perhaps less artificially, by invoking the maxim *mobilia sequuntur personam, Blodgett* v. *Silberman, supra; Baldwin* v. *Missouri, supra,* which means only that it is the identity or association of intangibles with the person of their owner at his domicile which gives jurisdiction to tax. But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. * *"

* * * * *

"* * We have recently declined to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state. We think it cannot be pressed so far here."

The minority of the court disagreed and held that the rule of single taxation should be applied and that the state of domicile must yield to the state of business situs.

However, the majority of the court in *Curry* v. *McCanless,* referred specifically to the authority of *First National Bank* v. *Maine* and, while declining to apply the single tax rule to the circumstances of the case before the court, reaffirmed the application of the rule made to the facts presented in *First National Bank* v. *Maine,* in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* and in *Baldwin* v. *Missouri, supra.* It was said (p. 363):

"The doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state has received support to the limited extent that it was applied in *Farmers Loan & Trust Co.* v. *Minnesota,*

280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *First National Bank* v. *Maine*, 284 U. S. 312. Still more recently this Court has declined to give it completely logical application. It has never been pressed to the extreme now urged upon us, and we think that neither reason nor authority requires its acceptance in the circumstances of the present case."

3. Petitioner relies upon five recent decisions of this Court. Because of them, it is argued, *First National Bank* v. *Maine* is no longer law (Pet. brief, p. 46). They are: *Curry* v. *McCanless*, 307 U. S. 357 (1939); *Graves* v. *Elliott*, 307 U. S. 383 (1939); *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U. S. 313 (1939); *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435 (1940); *Stewart* v. *Pennsylvania*, 312 U. S. 649 (1941).

Each of these cases is plainly distinguishable from *First National Bank* v. *Maine* and the case at bar. Neither the facts nor the decisions in any of them have any relevancy to the case at bar.*

In *Curry* v. *McCanless*, *supra*, the decedent, a resident of Tennessee, transferred certain stocks and bonds to an Alabama Trust Company upon an *inter vivos* trust. The trustee took possession of the securities in Alabama and administered the trust in that state. The decedent reserved the income to herself for life, the power to change trustees, the power to direct sales and investments and the power to dispose of the trust principal by will. She disposed of the property by her will upon trusts different from those in the trust deed. She appointed separate executors for her Alabama and Tennessee property and the will was probated in both states.

In a five to four decision this Court held that the testamentary transfer of the principal of the trust was taxable in both states.

The majority felt that the decedent in that case had voluntarily subjected her intangibles to the protection of two

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*The language in the opinions and the principles enunciated in these cases will be considered in our next point.

states and should therefore give a *quid pro quo* for the benefits and protection received from each of them. Because of this decedent's activities in connection with her property, it was thought that the rule of single taxation should not be applied to such a case. Chief Justice Stone, writing for the majority, said (p. 367):

> "* * * But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains * * *."

In *First National Bank* v. *Maine* the decedent had engaged in no activity outside his domicile. Nor did the decedent in the case at bar. Mr. Harkness never was engaged in business in Utah; his shares of Union Pacific Railroad Company stock were never used in connection with any business in Utah but were kept by him in New York, the state of his domicile (R. 3). The decision in *Curry* v. *McCanless* just has no applicability whatever to the situation presented in *First National Bank* v. *Maine* and in the case at bar.[7]

At the same term of this Court *Graves* v. *Elliott, supra,* was decided with the same division of the Justices. That also was a trust case, the facts being substantially the same as in *Curry* v. *McCanless,* and the majority and minority opinions followed the same reasoning as in the companion case.

Newark Fire Insurance Co. v. *State Board, supra,* involved the right of the State of New Jersey to tax the capital stock and surplus of a domestic corporation which

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[7]The minority in *Curry* v. *McCanless* held that the rule of single taxation should be applied and that Alabama alone could tax the transfer because the intangibles had acquired a situs in that state akin to a business situs.

had its main office and transacted its business in New York. The tax was upheld in an eight to one decision, but two opinions were written in each of which four justices concurred.

Mr. Justice Reed, with whom Chief Justice Hughes, Mr. Justice Roberts and Mr. Justice Butler concurred, held that under the maxim *mobilia personam sequuntur* the presumption is that the taxable situs of a corporation's intangibles is the state of the corporation's origin unless a business or commercial situs is acquired elsewhere. Whether the domicile and the state of business situs both could tax, it was not necessary to decide since on the facts in the case before the court, he found that the Insurance Company had not acquired a business situs in New York. Hence, he concluded, "The presumption of a taxable situs solely in New Jersey is not overturned" (p. 322).

Mr. Justice Frankfurter, with whom the present Chief Justice, Mr. Justice Black and Mr. Justice Douglass concurred, held that *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325 (1920), and the cases which had followed it afforded a wholly adequate basis for the challenged tax.[8]

So the *Newark Fire Insurance Co.* case did not involve a transfer tax at all and certainly bears no relation to the problem in the case at bar.

Wisconsin v. *J. C. Penney Co.*, *supra*, presented what the majority of this Court considered to be a supplemental income tax laid by Wisconsin on income earned in that state by foreign corporations and what the minority considered a privilege tax laid on dividends declared and paid in another state. The majority's concept of the nature of the tax spelled validity; the minority's spelled invalidity. The division of the Court was five to four.

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[8]In that case this Court had upheld a North Dakota tax on domestic corporations measured by the value of their tangible property in North Dakota plus the value of their capital stock after deducting the value of their tangibles located outside of North Dakota.

If the tax there questioned was truly an income tax, no one would doubt its validity. *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366 (1937). But so considered, neither the tax nor the decision has any bearing on the case at bar.

If the tax should rather be considered an attempt by Wisconsin to lay a tax on a privilege exercised outside its borders, then we submit the minority correctly branded it as invalid under the Fourteenth Amendment.

In the case at bar there is no room for any difference of opinion as to the nature of the tax. We are concerned with a tax on a transfer which took place outside of the State imposing the tax. The reasoning of the minority in dealing with such a tax has its significance for the case at bar (pp. 446-447):

> "I assume that the principle still holds good that a state, a member of the sisterhood of states in the Republic, cannot extend her sovereignty by legislation so as to prohibit, to regulate, or to tax property or transactions of citizens of other sovereign states lying outside her boundaries and regulated by the law of the state of domicile or residence. * * * Those activities which have a real and substantial relation to the business transacted by the citizen of another state within her confines are, of course, subject to regulation and to taxation. It would be mere affectation to cite the adjudications of this court which are founded upon these propositions. I have thought that these principles were of the very warp and woof of the constitutional system which binds the states together in a federal union. Attempted transgressions of these limits of state sovereignty have time and again run afoul of the Fourteenth Amendment."

Stewart v. *Pennsylvania*, 312 U. S. 649, was another trust case in which this Court upon the authority of the *Curry* and *Graves* cases upheld a tax by the state of domicile upon an equitable interest in a trust administered in another state. No opinion was written.

POINT V

No principles have been enunciated by this Court which cast any doubt on the soundness of the decision in First National Bank *v.* Maine.

As already indicated, during the past ten years some members of this Court have differed in the extent to which the Court should go in the application of the principle of single taxation. Feeling that the emphasis should rather be on the benefit or protection given by a state to the thing taxed, they have preferred that approach to the problem of the state's jurisdiction to tax even though in some instances it would result in double taxation.

The recognition that the basis of all taxation is the benefit conferred by the taxing power is of course not new. That concept finds expression in early decisions of this Court. See, *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202 (1905). It is important, however, to keep in mind that the benefit justifying the tax must be a benefit conferred directly in connection with the thing taxed. For example, a franchise granted to a foreign corporation permitting the transaction of business within a state would not justify that state taxing business done by the corporation elsewhere. Its taxing power would be limited to the business done within the state.

That principle, that approach to the constitutional problem of the state's jurisdiction to tax, in no degree casts any doubt upon the soundness of the decision in *First National Bank* v. *Maine*. Nor is there anything in the opinions rendered by any members of this Court since that decision which would indicate that on any theory the state of incorporation has the constitutional power to tax a testamentary transfer of shares of stock owned by a nonresident decedent.

In the discussion to follow we shall ignore the question of double taxation and the interpretation of the Fourteenth

Amendment which places upon this Court the duty of preventing an oppressive and unfair exercise of the taxing power by the states. We shall weigh the merits of the decision, as distinguished from the grounds of the decision, in *First National Bank* v. *Maine* and shall consider the constitutional power of the state of incorporation to tax the testamentary transfer of shares of stock owned by a non-resident decedent solely in the light of the test prescribed in the opinions which the petitioner in the case at bar asserts have "denounced and reversed" the *First National Bank* decision (Petitioner's Brief, pp. 46-61). Petitioner has cited five cases: *Curry* v. *McCanless*, 307 U. S. 357 (1939); *Graves* v. *Elliott*, 307 U. S. 383 (1939); *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U. S. 313 (1939); *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435 (1940); *Stewart* v. *Pennsylvania*, 312 U. S. 649 (1941) (no opinion).[9]

The principles relied upon by the petitioner were given expression in the majority opinions in *Curry* v. *McCanless, supra*, and *Wisconsin* v. *J. C. Penney Company, supra*. Although each of those cases is plainly distinguishable on its facts and in its decision from the case at bar, we shall examine and apply to the case at bar the test laid down in them.

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[9]It should be pointed out that the petitioner's entire argument based upon these decisions is unsound. The argument is this: the majority in these cases declined to accept the principle that the Fourteenth Amendment permits taxation of the transfer of intangibles by only one state; that principle was given by the court in *First National Bank* v. *Maine* as the basis of its decision; hence that decision has been overruled by implication. (See petitioner's brief, p. 56). A decision is not overruled by a refusal by the court to apply its reasoning in a later case unless the decision cannot be upheld on any reasoning. While in the cases relied on by the petitioner five members of this Court were unwilling to apply the principles enunciated in *First National Bank* v. *Maine*, the principles they did apply fully sustain the decision (as distinguished from the ground of the decision) in that case and hence fully sustain the judgment now under review. This will be demonstrated in this Point of our brief.

In the majority opinion in *Curry* v. *McCanless* it was said (pp. 367-370):

> "* * * Whether we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland, supra,* through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, * * *"
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> * * * * * *
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> "If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, * * *"

In the majority opinion in the later case, *Wisconsin* v. *J. C. Penney Co.*, it was said (p. 444):

> "* * * We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extra-territoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." * * *"[10]

Did the taxing power asserted by the State of Maine in *First National Bank* v. *Maine* and by the State of Utah

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[10]Power or control over the object taxed is thus apparently discarded as a basis of taxing power—and rightly so unless we wish to sanction the doctrine that might makes right, a concept abhorrent to the American system.

in the case at bar bear fiscal relation to protection, opportunities and benefits given by the state? We assert most emphatically that it did not.

As the present Chief Justice has said, "the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects."[11]

The taxing power asserted was not a power to tax shares of stock, as we have seen (Point III, *supra*). It was therefore not the power involved in *Corry* v. *Baltimore*, 196 U. S. 466 and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506. The states of Maine and Utah asserted the power to tax the testamentary transfer of shares of stock. Their tax was not a property tax at all, but a tax upon a privilege, the privilege of disposition of the shares at death.[12]

The privilege of transferring these shares at death, was granted the decedent by the state of his domicile. As the majority said in *Curry* v. *McCanless*, page 369, "she also provided that by resort to her power to dispose of property by will, conferred upon her by the law of the domicile, the trust could be terminated and the property pass under the will." The transfer of the shares is consequently taxable by the state of domicile. That state bestows a benefit, confers an opportunity.

But what of the state of incorporation, the other state which asserts a power to tax?

As we have seen, in *Curry* v. *McCanless* the second state to claim a tax was the domicile of the trustee who held legal

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[11] *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, 80 (1938). Mr. Justice Roberts, dissenting, in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 447 (1940) expressed the same view: "in testing the constitutionality of an exaction this court examines for itself the nature and incidence of the tax * * *." By incidence we mean the direction of the fall of the tax; toward what it is aimed.

[12] Petitioner in its discussion of the protection and benefits given by the State of Utah persistently refers to the shares of stock as the object of the tax rather than the testamentary transfer of the shares. Its entire argument on pages 12 to 14 of its brief is therefore wholly beside the point.

title. Resort had to be made to that state to perfect the testamentary transfer. "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both" (p. 372).

In neither *First National Bank* v. *Maine* nor in the case at bar did the decedent extend "his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state", to borrow again the words of the majority in *Curry* v. *McCanless* (p. 367). Certainly in the case at bar, if not in *First National Bank* v. *Maine*,[13] there was no need to invoke the law of the state of incorporation in connection with the transfer.

The decedent in the case at bar resided in New York and died there. His will was probated in New York and there alone. He was never engaged in business in Utah, his certificates of stock in Union Pacific Railroad Company were never within the State of Utah (R. 2, 3). Completion of the transfer by registration on the books of the Railroad Company could be achieved in New York and only in New York because there were no transfer facilities elsewhere.[14]

The testamentary transfer in this case neither in its legal nor its practical aspects bore any relation whatever

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[13] In *First National Bank* v. *Maine*, the dissenting justices pointed out that to complete the transfer in that case the shareholder had to resort to the law of the state of incorporation (p. 333). Apparently the only transfer office of the corporation was in that state. The divergence on this point between the *First National Bank* case and the case at bar will be discussed in our next Point.

[14] Even the Union Pacific Railroad Company has little association with the State of Utah. Incorporated there, yes, but for aught appears selection of any of the other states would have done as well. Its executive offices are located in New York and its board of directors meets there. Only a very small portion of its property is in Utah; less than ten per cent. of its revenue is derived from Utah and less than nine per cent. of its trackage is in that State (R. 2).

to the State of Utah. There was no relationship, fiscal or otherwise, between the asserted taxing power and the testamentary transfer of Mr. Harkness' shares. The state of Utah gave no opportunity, no protection and no benefit in connection with the transfer. In a word, it gave nothing for which it could ask a return.[15]

An analogous situation was presented in *Connecticut General Co.* v. *Johnson*, 303 U. S. 77 (1938). In that case

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[15]On pages 62 and 63 of the petitioner's brief we read: "The laws of the United States of America also have nothing to do with and can have no effect upon the devolution of or succession to property, or the probate of the estate of this decedent. Yet the jurisdiction and power of the Federal Government to levy an estate or transfer tax * * * has never been doubted since the decision in *Knowlton* v. *Moore*, (1900) 178 U. S. 41." So, even though the State of Utah contributes nothing to the testamentary transfer, still it should be permitted to tax it, petitioner implies.

In *Burnet* v. *Brooks*, 288 U. S. 378 (1933) the Respondents argued that since as between the States the transfer of intangibles could only be taxed at the state of domicile because of the Fourteenth Amendment, the intangibles of non-resident aliens could only be taxed at their national domicile and not by our Federal Government because of the Fifth Amendment. Now petitioner offers the converse.

This Court disposed of such a line of reasoning with the words, "The argument is specious, but it ignores an established distinction" (p. 401). The distinction referred to is that there are entirely different principles applicable to the taxing power of the Federal Government from those applicable to the States. The Federal Government may tax all persons and property within its control and necessarily its taxing powers parallel the taxing powers of the States. Otherwise, as this Court pointed out in the *Knowlton* case, the Federal Government would be excluded "from almost every subject of direct and many acknowledged objects of indirect taxation" (p. 59). The Court continued, "Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established" (p. 60).

It is therefore of no assistance in the solution of the problems of a state's taxing power, to consider the taxing power of the Federal Government.

this Court was confronted by an attempt by the State of California to levy a privilege tax upon contracts of reinsurance made and performed by a foreign corporation in another state. The tax was held to infringe the due process clause of the Fourteenth Amendment.

The Treasurer of California had argued that since the corporation had been licensed to do business in that state and the risks reinsured against were based on policies of other companies issued in California to residents there, the making of the reinsurance contracts constituted a doing of business in that state. The argument was rejected. The present Chief Justice writing for the Court, with but one Justice dissenting, said (pp. 81-82):

> "* * Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."
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> * * *
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> "* * All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

So, the testamentary transfer of Mr. Harkness' shares of Union Pacific stock was not dependent upon any privilege or authority granted by the State of Utah and consequently the tax asserted in the case at bar cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state of Utah.

POINT VI

The Uniform Stock Transfer Act and the trend of modern decisions apart from that Act adopting the mercantile concept of shares of stock are additional reasons for applying the decision in *First National Bank* v. *Maine* to the case at bar.

We wish to urge the significance of two important elements present in the case at bar, but absent from *First National Bank* v. *Maine*. These features remove the sole basis found by the minority of this Court in *First National Bank* v. *Maine* for supporting the tax in that case.

On page 333 of his opinion in the *First National Bank* case the present Chief Justice said:

> "But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law."

There the minority of the Court felt that the stockholder could not secure complete protection and effect a complete transfer of his interest without resort to the law of the state of incorporation. But in that case, the state of incorporation had not enacted the Uniform Stock Transfer Act and the transfer office of the corporation in question was located in the state of incorporation. On the contrary, in the case at bar: the State of Utah has adopted the Uniform

Act[16] and the sole transfer office of the Union Pacific Railroad Company was located outside the state of incorporation (R. 2). Consequently, the stockholder in the case at bar had no need to invoke the law of Utah to secure complete protection or to effect a complete transfer of his interest.

Let us see the effect which the courts have given to the enactment of the Uniform Stock Transfer Act and the significance attributed to the location of the transfer office of a corporation.

The Uniform Stock Transfer Act was designed primarily to enact into law the Mercantile theory of shares and certificates of stock. In the words of the National Conference of Commissioners on Uniform State Laws the object of the act was

> "* * * that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage." (Commissioners' note, 6 Uniform Laws Annotated at page 2.)

Accordingly, in the Uniform Stock Transfer Act set forth in the Revised Statutes of Utah, 1933, the following provisions, among others, are to be found:

Section 18-3-1 makes the transfer of the certificate operate as a transfer of the shares. It provides:

> "SECTION 18-3-1. *Exclusive Manner of Transfer.*
>
> Title to a certificate and to the shares represented thereby can be transferred only:

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[16]The Uniform Stock Transfer Act has now been adopted in 31 States. The State of Utah adopted the Act in 1927 (See Revised Statutes of Utah, 1933, Sections 18-3-1 to 18-3-21). The State of New York had adopted the Act previously (Personal Property Law, Sections 162-185).

The State of Maine is one of the few States which has never adopted the Uniform Stock Transfer Act. Hence its operation and effect played no part in the decision in *First National Bank* v. *Maine*.

(1) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or

(2) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

Section 18-3-5 grants full negotiability to the certificates of stock.

Section 18-3-13 provides that no attachment or levy upon the shares shall be valid unless the certificates be actually seized by the officer making the attachment or levy, or they be surrendered to the corporation which issued them or their transfer by the holder be enjoined.

Section 18-3-15 is also in pursuance of the general policy of the act and provides that there shall be no lien in favor of the corporation upon the shares and no corporate restrictions upon the transfer of the shares, unless the lien or restriction is stated on the certificate.

Although in most of the states which have enacted it, the Act is relatively new, there is a growing body of authority to the effect that the Uniform Stock Transfer Act operates broadly to merge the shares into the certificates in situations involving the ownership and transfer of the shares.

Thus it is established that in states which have adopted the Act shares of stock no longer have their situs at the

corporate domicile for purposes of attachment and levy. The share interest may only be attached through the attachment of the certificate itself unless the certificate has been surrendered to the corporation or its transfer by the holder has been enjoined.

Revised Statutes of Utah, 1933, Section 18-3-13;
American Surety Co. v. *Kasco Mills, Inc.*, 262 N. Y. 585, 188 N. E. 75 (1933);
Elgart v. *Mintz*, 123 N. J. Eq. 404, 197 Atl. 747 (1938);
Mills v. *Jacobs*, 333 Pa. 231, 4 Atl. (2d) 152 (1939);
Bloch-Daneman Co. v. *J. Mandelker & Sons*, 205 Wisc. 641, 238 N. W. 831 (1931).

Likewise it has been held under the Act that for purposes of *in rem* proceedings shares of stock no longer constitute property at the corporate domicile, where the certificates are owned and held outside of the state of incorporation.

Montfort v. *Korte*, 100 F. (2d) 615 (C. C. A. 7th) (1938);
Klein v. *Wilson & Co.*, 7 F. (2d) 769, aff'd., 7 F. (2d) 777 (C. C. A. 3rd) (1925);
Iron City Savings Bank v. *Isaacsen*, 158 Va. 609, 164 S. E. 520 (1932);
Elgart v. *Mintz, supra.*

In the *Montfort* case the Circuit Court of Appeals for the Seventh Circuit held that the District Court in Indiana did not have jurisdiction *in rem* over shares of stock in an Indiana Corporation, the certificates for which were outside of the State. After reciting the old doctrine that the shares of stock have their situs in the State of incorporation the Circuit Court stated (pp. 616, 617):

> "It becomes apparent, however, that a distinction has generally been made in states where a Uniform Stock Transfer Act is in effect. Such an act exists in Indiana. * * *

"* * * the situs of pledged securities, including stock in a corporation, is in the jurisdiction where such security or stock is owned or possessed. Applying such pronouncement to the instant case, it is apparent that the situs or res of the stock in controversy is in Kentucky rather than Indiana, and that plaintiff's theory that its action is maintainable as one in rem, must fail. * * *"

The Court in its opinion approved the following language in 39 Harvard Law Review at page 485:

"An apparent exception to the rule that shares of stock have a situs at the domicile of the corporation is found where the Uniform Stock Transfer Act is in force. This enactment merges the share in the certificate so that the state dealing with the certificate has power to affect the shares independently of the state of the corporate domicile."

This same principle was applied in *Klein* vs. *Wilson & Co., supra,* where the United States District Court for New Jersey vacated an order appointing an ancillary receiver for a New York corporation which in turn held stock in the New Jersey subsidiary. In holding that the shares of stock in the New Jersey corporation did not constitute property within the State of New Jersey, the District Court stated at page 771:

"* * * the situation created as above is governed by the provisions of the Uniform Transfer Act of New Jersey (Chapter 191, Laws of 1916) which regulates the passage of title of stock certificates. * * * Under these provisions I conceive the stock certificates to be more than mere evidence of interest in property, and to be the concrete physical representation of such interest, possessed of such characteristics and qualities as necessitates an actual delivery thereof in order to transfer title to the certificates themselves and the shares represented by them. This being the case, they are properly within the jurisdiction of, * * * the domiciliary receivers [of the parent corporation in New York] and quite beyond any claim which might be asserted by a receiver appointed under any New Jersey authority, state or federal."

No case has been found in which the Uniform Stock Transfer Act has been applied in determining the choice of place of administration of decedents' estates. But in his work, *The Conflict of Laws*, Professor Beale states (Sec. 477.2, p. 1502):

> "It is submitted that the Uniform Stock Transfer Act should be construed as adopting the Mercantile view whole-heartedly including the treatment of certificates as controlling the shares for purposes of administration. There is however real doubt how far a court, which has prior to Act held the situs for administration to be at the domicile of the corporation, will hold that the Uniform Act has introduced a new rule in this particular."[17]

Finally, we find that the Act has also been applied to inheritance taxes. In *Newell* v. *Tremont Lumber Co.*, 161 La. 649, 109 So. 344 (1926), the Supreme Court of Louisiana held that under the Uniform Stock Transfer Act the shares of stock in a domestic corporation were no longer to be considered property physically located within that state for Inheritance Tax purposes. The court stated at page 652:

> "* * * under the provisions of that statute [referring to the Uniform Stock Transfer Law] no title to shares of stock in a corporation can be acquired or held by anyone, in any way, adversely to the bona fide holder of the certificate of stock duly indorsed. See sections 1, 8, 10 and 13. The transferable value of the stock lies, therefore, wholly in the certificates; and thus the certificates are by law made the corporeal or physical representatives of the stock itself, so that,

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[17] In *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394 (1917) cited at page 36 in petitioner's brief, this Court held that the state of incorporation has jurisdiction for the purpose of founding administration (as well as taxing the succession) of shares of stock. But the decision was placed squarely on the control then enjoyed by the state of incorporation over the transfer of the shares of stock (p. 401). Under the Uniform Stock Transfer Act that control passes out of its hands.

where said certificates are, there also, the stock itself is physically located."[18]

Not only have there been these decisions resting upon the Uniform Stock Transfer Act, but even without reliance upon that Act there has been an increasing acceptance by the judiciary of the Mercantile view of merger of the share in the certificate.

Certificates of stock in a foreign corporation have been held subject to attachment in the jurisdiction in which they have been physically situated, *Simpson* v. *Jersey City Contracting Company*, 165 N. Y. 193, 58 N. E. 896 (1900); *People ex rel Wynn* v. *Grifenhagen*, 167 App. Div. (N. Y.) 572, 152 N. Y. S. 679 (1915); *Puget Sound National Bank* v. *Mather*, 60 Minn. 362, 62 N. W. 396 (1895); see *Mitchell* v. *Leland Co.*, 246 Fed. 163 (C. C. A. 9th) (1917). The principle of those decisions was recognized by this Court in *Yazoo & M. V. R. R. Co.* v. *Clarksdale*, 257 U. S. 10, 22 (1921). Such certificates have also been held to constitute a *res* over which the local court may have jurisdiction *in rem*, *Vidal* v. *South American Securities Co.*, 276 Fed. 855 (C. C. A. Second Cir. 1922). The courts of the corporate domicile have on occasion declined to administer the shares of the stock of a non-resident decedent in a domestic corporation, *Lohman* v. *Kansas City Southern Railway Co.*, 326 Missouri 819, 33 S. W. (2d) 112 (1930).

Furthermore, in other fields unrelated to attachments, proceedings *in rem* or administration of estates, the Mercantile view has gained headway. (1) For the purpose of interpreting a testamentary division of property, it has been the Mercantile view that has been utilized. In *In re Clark*, L. R. (1 Chancery, 1904) 294, it was held that shares of stock in a South African corporation constituted "property in England" the physical location of the certificates. (2) The theft of unindorsed stock certificates has been held to be a theft of the "shares themselves", entitling the

[18]Thus clearly is the basis of the decision set forth notwithstanding the perplexity expressed on page 28 of petitioner's brief.

plaintiff to recover the market value of the shares and not simply the nominal damages which would result from a theft of a mere muniment of title. *Pierpoint* v. *Hoyt*, 260 N. Y. 26, 182 N. E. 235 (1932); see also *McAllister* v. *Kuhn*, 96 U. S. 87, 89 (1877), and *Ayres* v. *French*, 41 Conn. 142, 151 (1874). (3) In New York it has been held that the adoption of the Sales Act governing goods and chattels changed the law with respect to the sale of stock because the certificate embodying the share must be treated as a chattel. *Agar* v. *Orda*, 264 N. Y. 248, 190 N. E. 479 (1934). (4) In *Direction Der Disconto-Gesellschaft* v. *U. S. Steel Corp.*, 267 U. S. 22 (1925) this Court held that a transfer of title to a certificate of stock in a New Jersey corporation valid under the law of England where the transfer occurred effectively transferred title to the share itself.

At the close of its brief the petitioner has tucked in an argument based upon the petitioner's conception of the New York stamp tax on transfers of stock (pp. 61-62). The pertinent sections of the New York statutes are set forth in the footnote.[19] Of that tax petitioner says (1) "by the

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[19]For many years prior to 1933 Sections 270 and 270-a of the New York Tax Law imposed a tax

> " • • • on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock, or certificates of rights to stock, or certificates of deposit representing certificates taxable under this article in any domestic or foreign association, company or corporation, or certificates of interest in business conducted by a trustee or trustees, made after the first day of June, nineteen hundred five, whether made upon or shown by the books of the association, company, corporation or trustee, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final • • • "

and exempted from the tax such shares and certificates

> " • • • in any domestic association, company or corporation, even though a record of the transfer is made in the stock book kept in compliance with section ten of the stock corporation law, if neither the sale, nor the agreement to sell,

terms thereof, every transfer of stock in a New York corporation is subjected to a transfer tax''; and (2) ''this type of tax has been sustained so far as its constitutionality is concerned''. Neither of those statements is correct.

(1) Prior to 1933 New York taxed none of the transfers of stock in New York corporations unless some part of the transaction constituting the transfer occurred within the state. The statute expressly provided that recording the transfer in the stock book of the company did not bring the transfer within the state. Thus the New York legislature

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nor the memorandum of sale, nor the delivery is made in this state and no act necessary to effect the transfer is done in this state. * * * ''

In 1933 Section 270 was amended to provide:

'' * * * It is not intended by this article to impose a tax * * * .''

'' * * * in respect to shares or certificates of stock, or certificates of rights to stocks, or certificates of deposit representing certificates of the character taxed by this article, in any domestic association, company or corporation, even though a record of the transfer is made in the stock book kept in compliance with section ten of the stock corporation law, if the transfer is made upon the books of such association, company or corporation regularly kept at a transfer office or by a transfer agent outside the state provided the keeping of such books outside the state is necessary or convenient for the transaction of the ordinary business affairs of such association, company or corporation and is approved by the tax commission, and neither the sale, nor the agreement to sell, nor the memorandum of sale, nor the delivery is made in this state and no act necessary to effect the transfer (other than the making of a record in the stock book kept in compliance with section ten of the stock corporation law) is done in this state. * * *''

Section 10 of the New York Stock Corporation Law provides:

'' * * * Every stock corporation shall keep * * * a book to be known as the stock book * * * . If any such corporation has *in this state* a transfer agent, such stock book may be deposited in the office of such agent, or may be kept in the office of the corporation at its option * * * .'' (Italics ours)

regarded neither the incorporation of the corporation in the state nor the recording of the transfer there as sufficient basis for a tax.

Since the amendment made to the statute in 1933, none of the transfers of stock in New York corporations have been taxable unless (a) there was no regularly conducted, approved transfer agent outside the state where the transfer was recorded or (b) some part of the transaction took place within the state. The statute still provides that recording the transfer on the books within the state does not in itself bring a transfer within the tax.

So the statute has never taxed "every transfer of stock in a New York corporation". Before 1933 all transfers effected outside the state were expressly excluded from the tax. Since 1933 all transfers effected outside the state and recorded by a regularly conducted, approved transfer agent outside the state have been expressly excluded from the tax. In the case at bar, the only transfer agent in existence was outside the State of Utah and no part of the transfer took place in that state—so, using the New York criteria, the transfer was beyond the reach of the tax.

(2) There has been no decision upholding the constitutionality of the New York stock transfer tax where the transfer taxed took place completely outside the state. In each of the cases dealing with aspects of constitutionality the transfer taxed took place within the state (*New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152 (1907); *Vaughn* v. *State of New York*, 272 N. Y. 102, 5 N. E. (2d) 53 (1936); *Williams* v. *State of New York*, 273 N. Y. 458 (1936); *O'Kane* v. *State of New York*, 283 N. Y. 439, 28 N. E. (2d) 905 (1940)).

Whatever strength there is in the analogy suggested by the petitioner, therefore, supports the position of the Respondents not that of the petitioner in the case at bar.

We now come to the significance of the location of the transfer office. It has been held that for the purpose of transfer, the shares of stock of a corporation must be re-

garded as having a situs where the transfer books and records of the corporation are kept.

Lockwood v. *U. S. Steel Corp.*, 209 N. Y. 375, 103 N. E. 697 (1913);
Lohman v. *Kansas City Southern Railway Co.*, 326 Missouri 819, 33 S. W. (2d) 112 (1930);
Vidal v. *South American Securities Co.*, 276 Fed. 855 (C. C. A. 2nd) (1922).

In the *Lockwood* case a question was presented as to whether an executor appointed in New York for a Bermuda decedent had jurisdiction over the decedent's shares of stock in a New Jersey corporation and could compel their transfer in New York. The certificates were physically located in New York and the corporate transfer office was here. The Court of Appeals through Judge Bartlett referred to the view that the situs of shares of stock of a corporation could be only in one of two places, the domicile of the corporation (in that case New Jersey) or the domicile of the decedent (Bermuda), and stated (p. 385):

> "In the present case, however, it is alleged in the complaint and necessarily admitted by the demurrer that the defendant maintains in the county and city of New York an office for the purpose of receiving certificates of its corporate stock for transfer upon its books and of delivering new certificates when such transfers have been made. Does not this fact constitute New York the domicile of the corporation, to some extent at least—so far as the registry and transfer of shares therein are concerned? We think it does. * * * "

In the case at bar, the law of New York granted Mr. Harkness the right to transfer his shares by his will and the law of that State determined the rights of his beneficiaries in the transfer. The enactment of the Uniform Stock Transfer Act by Utah was a recognition by that State that for the purposes of transfer, at least, the shares of stock

of its corporations were merged in the certificates. Power over the transfer of the shares was acknowledged to rest elsewhere than in the state of incorporation. The sole transfer office of the Union Pacific Railroad Company was in New York (R. 2), and the new certificates will be issued there. Nothing had to be done in Utah, no resort had to be made to the law of Utah to complete the transfer of the ownership of the decedent's shares.

Hence, in connection with the testamentary transfer of these shares of stock, the State of Utah has played no part and has given nothing for which to exact a tax.

CONCLUSION

The judgment under review should be affirmed.

Respectfully submitted,

MELBER CHAMBERS,
Counsel for Respondents.

p 12.

SUPREME COURT OF THE UNITED STATES.

No. 814.—October Term, 1941.

The State Tax Commission of Utah, Petitioner, *vs.* Malcolm P. Aldrich and Mary S. Harkness, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Utah.

[April 27, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this case is whether the State of Utah is precluded by the Fourteenth Amendment from imposing a tax upon a transfer by death of shares of stock in a Utah corporation, forming part of the estate of a decedent who, at the time of his death, was domiciled in the State of New York and held there the certificates representing those shares.

In 1940 Edward S. Harkness died testate, being at that time domiciled in New York. His estate was probated in New York where respondents were appointed executors. Respondents were also appointed administrators with the will annexed in Utah. At the time of his death Harkness was the owner of 10,000 shares of common stock and 400 shares of preferred stock of the Union Pacific Railroad Co., a Utah corporation. The certificates representing those shares were never within Utah. They were in the possession of Harkness in New York at the time of his death and are now held by respondents. For many years the Union Pacific Railroad Co. has kept its stock books and records and transfer agents in New York and has not maintained any in Utah. These shares are the only property owned by decedent which is claimed to be within the jurisdiction of Utah. At the date of decedent's death a New York statute allowed as a credit against the estate tax imposed by New York the amount of any constitutionally valid estate

or inheritance tax paid to any other state within three years after the decedent's death.[1]

Respondents sought a declaratory judgment in the Utah court holding that the transfer of the shares was not subject to tax by Utah under the provisions of its inheritance tax law.[2] The trial court entered judgment for respondents. The Supreme Court of Utah, under the compulsion of *First National Bank* v. *Maine*, 284 U. S. 312, affirmed. — Utah —, 116 Pac. 2d 923. We granted the petition for certiorari so that the constitutional basis of *First National Bank* v. *Maine* could be reexamined in the light of such recent decisions as *Curry* v. *McCanless*, 307 U. S. 357, and *Graves* v. *Elliott*, 307 U. S. 383. And see *Commonwealth* v. *Stewart*, 338 Pa. 9, aff'd 312 U. S. 649.

There can be no doubt but that the judgment below should be affirmed if *First National Bank* v. *Maine* is to survive, as the judgment in that case prohibited the State of Maine from doing what the State of Utah is here attempting. But we do not think it should survive. And certainly it cannot if the principles which govern the *Curry* and *Graves* cases rest on firm constitutional grounds.

First National Bank v. *Maine*, like its forerunners *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204 and *Baldwin* v. *Missouri*, 281 U. S. 586, read into the Fourteenth Amendment a "rule of immunity from taxation by more than one state." 284 U. S. p. 326. As we said in the *Curry* case that doctrine is of recent origin. Prior to 1930, when *Blackstone* v. *Miller*, 188 U. S. 189, was over-

[1] N. Y. L. 1930, c. 710, § 1, amended L. 1934, c. 639, § 1; McKinney's Cons. L., Bk. 59, Tax Law, § 249-o. This section was repealed by L. 1940, c. 138. For the present provision see McKinney, *op. cit.*, Cum. Ann. Pt. (1941) § 249-o.

[2] Rev. Stat. Utah, 1933, § 80-12-2 provides:

"'A tax equal to the sum of the following percentages of the market value of the net estate shall be imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of this state:

"Three per cent of the amount by which the net estate exceeds $10,000 and does not exceed $25,000;

"Five per cent of the amount by which the net estate exceeds $25,000."

Sec. 80-12-3 provides:

"The value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property, real or personal, within the jurisdiction of this state, and any interest therein, whether tangible or intangible, which shall pass to any person, in trust or otherwise, by testamentary disposition or by law of inheritance or succession of this or any other state or country, or by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after his death."

ruled by *Farmers Loan & Trust Co.* v. *Minnesota*, the adjudications of this Court clearly demanded a result opposite from that which obtained in *First National Bank* v. *Maine*. That was recognized by the majority in the latter case (284 U. S. p. 321)—and properly so because *Blackstone* v. *Miller* rejected the notion that there were constitutional objections to double taxation of intangibles by States which had command over them or their owner. And see *Kidd* v. *Alabama*, 188 U. S. 730, 732. *Blackstone* v. *Miller* permitted New York to tax the transfer of debts owed by New York citizens to a decedent who died domiciled in Illinois, although Illinois had taxed the entire succession. Mr. Justice Holmes, speaking for the Court, upheld the power of New York to collect the tax because the transfer of the debts "necessarily depends upon and involves the law of New York for its exercise". 188 U. S. p. 205. It was that view which the minority in *First National Bank* v. *Maine* championed. They maintained that there was no constitutional barrier to taxation by Maine of the transfer of the shares of stock of the Maine corporation, since the nature and extent of the decedent's interest in the shares were "defined by the laws of Maine, and his power to secure the complete transfer" was "dependent upon them." 284 U. S. p. 332. That view had been repeatedly expressed in other earlier cases touching on the rights of a State to tax intangibles over which it had command though the owner was a non-resident. *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 503-504; *Hawley* v. *Malden*, 232 U. S. 1, 12; *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; *Frick* v. *Pennsylvania*, 268 U. S. 473, 497; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69, 81. As stated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 429, the power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation. . . ."

It was that view which we followed in the *Curry* case. We held there that the Fourteenth Amendment did not prevent both Alabama and Tennessee from imposing death taxes upon the transfer of an interest in intangibles held in trust by an Alabama trustee but passing under the will of a beneficiary decedent domiciled in Tennessee. We stated that rights to intangibles "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in

courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. . . . . Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities." 307 U. S. p. 366. We held that the power to tax intangibles was not restricted to one State whether "we regard the right of a state to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch* v. *Maryland*, *supra*, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both". *Id.* pp. 367-368. And we added: "Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state." *Id.*, p. 368. In the recent case of *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, we gave renewed expression to the same view: "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." And see *Graves* v. *Schmidlapp*, No. 604, decided March 30, 1942.

Furthermore, the rule of immunity against double taxation espoused by *First National Bank* v. *Maine* had long been rejected in other cases. *Kidd* v. *Alabama, supra; Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. We rejected it again only recently. *Illinois Central Railroad Co.* v. *Minnesota*, 309 U. S. 157. And as we pointed out in the *Curry* case the reasons why the Fifth Amendment "does not require us to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner" (*Burnet* v. *Brooks*, 288 U. S. 378) are no less cogent in case of the Fourteenth. 307 U. S. pp. 369, 370.

The recent cases to which we have alluded are all distinguishable on their facts. But their guiding principles are irreconcilable with the views expressed in *First National Bank* v. *Maine*. If we raised a constitutional barrier in this case after having let it down in the *Curry* case, we would indeed be drawing neat legal distinctions and refinements which certainly cannot be divined from the language of the Constitution. Certainly any differences between the shares of stock in this case and the intangibles in the *Curry* case do not warrant differences in constitutional treatment so as to forbid taxation by two States in the one case and to permit it in the other. If we perpetuated any such differences, we would be doing violence to the words "due process" by drawing lines where the Fourteenth Amendment fails to draw them. Furthermore, the legal interests in the intangibles here involved are as diverse as they were in the intangibles in the *Curry* case. And to say that these shares of stock were localized or had an exclusive situs in New York would be to indulge in the fiction which we rejected in the *Curry* case. Any such attempt to fix their whereabouts in New York would disregard the intimate relationship which Utah has to this corporation and its shares.

More specifically, if the question is "whether the state has given anything for which it can ask return" (*Wisconsin* v. *J. C. Penney Co., supra*, p. 444) or whether the transfer depends upon and involves the law of Utah for its exercise (*Blackstone* v. *Miller*) there can be no doubt that Utah is not restrained by the Fourteenth Amendment from taxing this transfer. The corporation owes its existence to Utah. Utah law defines the nature and extent of the interest of the shareholders in the corporation. Utah law affords protection for those rights. Utah has power over the transfer by the corporation of its shares of stock. Certainly that protection, benefit, and power over the shares would have satisfied the test of *Blackstone* v. *Miller* and *Curry* v. *McCanless*. But it is said that we are here interested only in the *factum* of the transfer and that the stockholder in the case at bar had no need to invoke the law of Utah to effect a complete transfer of his interest. The argument is based on the fact that the transfer office is located outside Utah and that under the Uniform Stock Transfer Act which Utah has adopted (Rev. Stat. 1933 §§ 18-3-1 *et seq.*) the trend is to treat the shares as merged into the certificates in situations involving the ownership and transfer of the shares. We do not stop to

analyze the many cases which have been cited nor to speculate as to how Utah would interpret its law in this regard. Suffice it to say that if that freedom of transfer exists as respondents claim, it stems from Utah law. It finds its ultimate source in the authority which Utah has granted. It is indeed a benefit which Utah has bestowed. For it alone Utah may constitutionally ask a return. In view of these realities we cannot say with the majority in *First National Bank* v. *Maine*, p. 327, that a "transfer from the dead to the living of any specific property in an event single in character and is effected under the laws, and occurs within the limits, of a particular state", so as to preclude Utah from imposing a tax on this transfer.

We are of course not unmindful of the notions expressed in *Farmers Loan & Trust Co.* v. *Minnesota* and repeated in *First National Bank* v. *Maine* that the view championed by *Blackstone* v. *Miller* disturbed the "good relations among the States" and had a "bad" practical effect which led many States "to avoid the evil by resort to reciprocal exemption laws." 280 U. S. p. 209. But as stated by the minority in *First National Bank* v. *Maine*, "We can have no assurance that resort to the Fourteenth Amendment, as the ill-adapted instrument of such a reform, will not create more difficulties and injustices than it will remove." 284 U. S. p. 334. More basically, even though we believed that a different system should be designed to protect against multiple taxation, it is not our province to provide it. See *Curry* v. *McCanless*, *supra*, pp. 373-374. To do so would be to indulge in the dangerous assumption that the Fourteenth Amendment "was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." Mr. Justice Holmes, dissenting, *Baldwin* v. *Missouri*, *supra*, p. 595. It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation.

For the reasons stated we do not think that *First National Bank* v. *Maine* should survive. We overrule it. In line with our recent decisions in *Curry* v. *McCanless*, *Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock "jurisdiction to tax" is not restricted to the domiciliary State. Another State which has extended benefits

or protection or which can demonstrate "the practical fact of its power" or sovereignty as respects the shares (*Blackstone* v. *Miller*, p. 205) may likewise constitutionally make its exaction. In other words, we restore these intangibles to the constitutional status which they occupied up to a few years ago. See *Greves* v. *Shaw*, 173 Mass. 205; *Larson* v. *MacMiller*, 56 Utah 84; and cases collected in 42 A. L. R. pp. 365 *et seq.*

We reverse the judgment below and remand the cause to the Supreme Court of Utah for proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S

SUPREME COURT OF THE UNITED STATES.

No. 814.—October Term, 1941.

The State Tax Commission of Utah, Petitioner, *vs.* Malcolm P. Aldrich and Mary S. Harkness, Administrators with the Will Annexed of the Estate of Edward S. Harkness, Deceased. | On Writ of Certiorari to the Supreme Court of the State of Utah.

[April 27, 1942.]

Mr. Justice Frankfurter, concurring.

A case of this kind recalls us to first principles.

The taxing power is an incident of government. It does not derive from technical legal concepts. The power to tax is coextensive with the fundamental power of society over the persons and things made subject to tax. Each State of the Union has the same taxing power as an independent government, except insofar as that power has been curtailed by the federal Constitution.

The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, Sec. 10[2]; (2) no State can, without the consent of Congress, lay any tonnage duties, Art. I, Sec. 10[3]; and (3) by virtue of the Commerce Clause, Art. I, Sec. 8[3], no State can tax so as to discriminate against interstate commerce. (For present purposes I put the Contract Clause to one side). None of these limitations touches the power of a State to create corporations and the incidental power to tax opportunities which such State-created corporations afford.

This phase of the taxing power, rooted in the established practices of the States in common with other governments, was not suddenly abrogated on July 28, 1868, when the Fourteenth Amendment became the law of the land. On the contrary, taxes based on the States' power over corporations of their own creation thereafter became an increasingly familiar source of revenue. Of course, the

Due Process Clause has its application to the taxing powers of the States—a State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no "jurisdiction to tax". But that phrase obscures rather than enlightens, for it only states a result and does not analyze the Constitutional problem. The right of a State to tax the effective acquisition of membership in a domestic corporation, wherever the piece of paper representing such a taxable interest may be physically located,—the immediate question before us—was not doubted until the decision of this Court only ten years ago in *First National Bank* v. *Maine*, 284 U. S. 312. That decision, as was made clear in its dissent, was an unwarranted deviation from unbroken legal history and fiscal practice. Drawn as the decision was "from the void of 'due process of law', when logic, tradition and authority have united to declare the right of the State to lay" such a tax (Holmes, J., dissenting in *Baldwin* v. *Missouri*, 281 U. S. 586, 596), due regard for the Constitution demands that the deviation be not perpetuated and that the power erroneously withdrawn from the States be again recognized.

Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one State, as well as of the nation. It does so because the transaction in its entirety may receive the benefits of more than one government. And the exercise by the States of their Constitutional power to tax may undoubtedly produce difficult political and fiscal problems. But they are inherent in the nature of our federalism and are part of its price. These difficulties are not peculiar to us. Kindred problems have troubled other constitutional federalisms. For Australia, see Report of the Royal Commission on the Constitution, Parliament of the Commonwealth of Australia (1929), p. 187 *et seq.*; for Canada, see 1 Report of the Royal Commission on Dominion-Provincial Relations (1940), p. 202 *et seq.*

"A good deal has to be read into the Fourteenth Amendment to give it any bearing upon this case." Holmes, J., dissenting in *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204, 218. We would have to read into that Amendment private notions as to tax policy. But whether a tax is wise or expedient is the business of the political branches of government, not ours. Considerations relevant to invalidation of a tax measure are wholly different from those that

come into play in justifying disapproval of a tax on the score of political or financial unwisdom.

It may well be that the last word has not been said by the various devices now available—through uniform and reciprocal legislation, through action by the States under the Compact Clause, Art. I, Sec. 10[3], or through whatever other means statesmen may devise—for distributing wisely the total national income for governmental purposes as between the States and the Nation. But even if it were possible to make the needed adjustments in the fiscal relations of the States to one another and to the federal government through the process of episodic litigation—which to me seems most ill-adapted for devising fiscal policies—it is enough that our Constitutional system denies such a function to this Court.

I agree, therefore, that *First National Bank* v. *Maine* should be overruled and that the tax imposed by Utah in this case is valid. To refuse to nullify legislation the frailties of which we think we see, is to respect the bounds of our Constitutional authority and not to indulge in a fiction. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129. To allow laws to stand is to allow laws to be made by those whose task it is to legislate. The nullification of legislation on Constitutional grounds has been recognized from the beginning as a most "delicate" function not to be indulged in by this Court simply because it has formal power to do so but only when compelling considerations leave no other choice. To suggest that when this Court finds that a law is not offensive to the Constitution and that it must therefore stand, we make the same kind of judgment as when on rare occasions we find that a law is offensive to the Constitution and must therefore fall, is to disregard the rôle of this Court in our Constitutional system since its establishment in 1789.

SUPREME COURT OF THE UNITED STATES.

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[April 27, 1942.]

Mr. Justice Jackson, dissenting.

State taxation of transfer by death of intangible property is in something of a jurisdictional snarl, to the solution of which this Court owes all that it has of wisdom and power. The theoretical basis of some decisions in the very practical matter of taxation is not particularly satisfying.[1] But a switch of abstract concepts is hardly to be expected without at least careful consideration of its impact on the very practical and concrete problems of states and taxpayers. Weighing the highly doctrinaire reasons advanced for this decision against its practical effects on our economy and upon our whole constitutional law of state taxation, I can see nothing in the Court's decision more useful than the proverbial leap from the frying pan into the fire.

I.

There is little persuasion and certainly no compulsion in the authorities mustered by the Court's present opinion, which are either admittedly overruled cases, such as *Blackstone* v. *Miller*, 188 U. S. 189, or admittedly distinguishable ones, such as *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. Such authorities are not

[1] Of one of them Mr. Justice Holmes said: "It seems to me that the result reached by the Court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment . . ." Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 211.

impressive in vindication of such a judgment. Without discussion of the academic merits of the decision that is being overruled I am willing to proceed on the estimate of it made at the time of its pronouncement by the present Chief Justice, who said in his dissent: "*Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired." *First National Bank* v. *Maine*, 284 U. S. 312, 332. The Court now discards this fiction in favor of one calling for a different result.

This older rule ascribed a fictional consequence to the domicile of a natural person; it is overruled by ascribing a fictional consequence to the domicile of an artificial corporation. The older rule emphasized dominance by the individual over his intangible property, the tax situs of which followed the domicile of its owner. Today's new rule emphasizes the dominance of the corporation, a creature of the legal imagination.[2] To this fictional personality it ascribes a hypothetical "domicile" in a place where it has but a fraction of its property and conducts only its formal corporate activities; and on the union of these two fictions it permits the chartering state to tax the estates of persons who never lived or did business therein. The reasoning back of the holding is this: Because Utah issued a charter to a corporation, which issued stock to a nonresident, which changed hands at his death, which required a transfer on the corporation's books, which transfer was permitted by Utah law, Utah got jurisdiction to tax succession to the stock. It is really as remote as that.

No one questions that a state which charters a corporation, even though it amounts to no more than giving "to airy nothing a local

[2] A corporation is defined by John Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law." Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636. The New York Court of Appeals has said: "A corporation, however, is a mere conception of the legislative mind. It exists only on paper through the command of the legislature that its mental conception shall be clothed with power." People v. Knapp, 206 N. Y. 373, 381. "It took half a century of litigation in this Court finally to confer on a corporation, through the use of a fiction, citizenship in the chartering state for jurisdictional purposes. . . . Throughout, the mode of thought was metaphorical." Mr. Justice Frankfurter, in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 169. Compare the cases where courts are obliged to disregard the corporate entity to avoid a variety of injustices. See Wormser, Disregard of the Corporate Fiction (1927).

habitation and a name," has the right to exact a charter fee, an incorporation tax, or a franchise tax from the artificial entity it has created. But that such chartering enables the taxing arm of the state to reach the estate of every stockholder, wherever he lives, and to tax the entire value of the stock because of "opportunities which it has given," "protection which it has afforded," or "benefits which it has conferred" is quite another matter. Utah is permitted to tax the *full value* of each share of Union Pacific stock passing by death. Any conceivable "opportunity," "protection," or "benefit" derived by the Union Pacific stockholders from Utah is negligible in proportion to the values Utah is authorized to tax.

It would be hard to select a case that would better demonstrate the fictional basis of the Court's doctrine of benefits and protection than this case of Utah and the Union Pacific Railroad. When Utah was admitted to statehood in 1896, the Union Pacific Railroad was already old as a national institution. The first white settlement in Utah made by the Mormons was in its second year when President Taylor recommended to Congress consideration of a railroad to the Pacific as a "work of great national importance and of a value to the country which it would be difficult to estimate."[3] In 1853, Congress appropriated $150,000 to make explorations and surveys to "ascertain the most practical and economical route."[4] In 1860, both the leading political parties in their platforms declared in favor of building such a road.[5] President Lincoln on July 1, 1862, signed[6] the war measure creating the Union Pacific Railroad Company and subsidizing the construction of the road,[7] which opened

[3] 6 Messages and Papers of the Presidents 2558, Message of December 4, 1849. President Buchanan also repeatedly recommended the road as a defense necessity to be constructed under the war power. *Id.* at 2988; *Id.*, Vol. 7, at 3057, 3103, 3181.

[4] 10 Stat. 219.

[5] Trottman, History of the Union Pacific (1923) 8.

[6] Sandburg, Abraham Lincoln—The War Years, Vol. 1, 510. See also Vol. 2, 461, for an account of Lincoln's selection of the location of its eastern terminal.

[7] It granted a right of way across the public lands owned by the United States and a subsidy loan of $16,000 per mile for the construction on the plain, $48,000 per mile for one hundred and fifty miles over the Rocky Mountains, and $32,000 per mile for the remainder. The construction amounted to 1,034 miles, and the subsidy loan to $27,236,512. The Central Pacific for 883 miles constructed from San Francisco to meet the Union Pacific received nearly an equal amount. 12 Stat. 489. Further grants were made by an Act of July 2, 1864, 13 Stat. 356.

on May 10, 1869.[8] The story of the Union Pacific has been a part of our national history. Not even its scandals were local. Its Credit Mobilier scandal rocked the nation.[9]

The road continued to be a national problem as well as a national enterprise. President Cleveland recommended to Congress in his message of December 3, 1894 consideration of reorganization.[10] The steps taken by the Government were reported to the Congress by President McKinley in his annual messages of 1897, 1898, and 1899. He reported the sale of the Union Pacific main line under the decree of the United States Court for the District of Nebraska on November 1 and 2, 1897.[11] Utah, on July 1, 1897, granted a charter to the present Union Pacific Railroad Company, as the Federal Government or any one of several state governments might have done. It has become one of the great and stable transportation systems of the United States.

If it had only the "opportunities" and "benefits" conferred by Utah and only the properties protected by her laws, the Union Pacific would cut little figure either in transportation or finance. It holds its stockholders' meetings in that State. But it maintains no executive office or stock transfer office in Utah. Its executive and stock transfer offices are in New York City. Its stocks are listed on the New York, Boston, London, and Amsterdam stock exchanges. Over 200,000 shares of its stock were traded on the New York Stock Exchange in 1939.[12] Its western operating office is not in Utah, but in Omaha, Nebraska. It is stipulated that less than 9% of its 9877 miles of trackage are in Utah and that during 1939, the railway operating revenue from Utah intra-state business plus the Utah proportion on a mileage basis of its interstate business was 8.97% of the entire gross operating revenues of the company.

What gives the Union Pacific stock its value, all of which is appropriated by this decision to Utah's taxing power, is its operation in interstate commerce, a privilege which comes from the United States and one which Utah does not give or protect and could not deny. The Union Pacific system itself is in interstate operation, embracing thirteen states and drawing its business from the whole

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[8] 11 Messages and Papers of the Presidents 638.

[9] Bowers, The Tragic Era (1929) 396 *et seq.*

[10] 13 Messages of the Presidents 5969.

[11] 13 Messages of the Presidents 6273, 6343, 6390.

[12] Moody's Steam Railroads (1940) 907.

country. Approximately 37% of its total tonnage was received from connecting lines.[13] If the values derived from privileges extended by the National Government and from rendering national transportation were to be allocated to any single state for tax purposes, a realistic basis would entitle the five States of Idaho, Kansas, Nebraska, Oregon, and Washington to some consideration, for each embraces, authorizes, and protects by its laws more miles of trackage than does Utah.[14]

These facts leave nothing of Utah's claim to tax the full value of Union Pacific shares when transferred by death of a nonresident stockholder, and no basis for the Court's decision that it may do so, except the metaphysics of the corporate charter.

II.

The theories on which this case is decided contrast sharply with certain hard facts which measure the decision's practical wisdom or lack of it.

1. The effect of the Court's decision is to intensify the already unwholesome conflict and friction between the states of the Union in competitive exploitation of intangible property as a source of death duties.

The practical issue underlying this case is not whether the Harkness estate shall pay or avoid a transfer tax. The issue is whether Utah or New York will collect this tax. It is admitted that if this Court breathes constitutionality into this Utah tax, all that Utah gets will be credited to the Harkness estate on its tax payable in New York as the state of domicile. The right of a state to tax succession to corporate stock by death of one domiciled therein, while not abrogated, is now subjected to an interfering and overlapping right of the state which chartered the corporation to tax the same stock transfer on a different and inconsistent principle. Since the chartering state has apparently been empowered to exact its tax as a condition of permitting the transfer, the taxing power of the state of the stockholder's domicile is really subordinated and deferred to the taxing power of the chartering state. By laying its tax on the gross value transferred, irrespective of the net value of the decedent's estate, the chartering state may give

[13] Moody's Steam Railroads (1940) 895.

[14] Mileage of the system is as follows: (1) Idaho, 2051.12; (2) Nebraska, 1355.68; (3) Oregon, 1172.48; (4) Kansas, 1159.87; (5) Washington, 1047.04; (6) Utah, 888.47; (7) Wyoming, 717.32; (8) Colorado, 609.13; (9) California, 390.52; (10) Nevada, 358.12; (11) Montana, 143.46; (12) Iowa, 2.48; (13) Missouri, 2.16. Moody's Steam Railroads (1940) 893.

its tax an effective priority of payment over the taxes laid by the domiciliary state and may collect what amounts to an inheritance tax even when there is no net estate to transfer. Thus, through the corporate charter fiction the chartering state may thrust its own tax with extraterritorial effect between the taxing power of the state of domicile and tax resources to which that State has had, and I think should have, first and under ordinary circumstances exclusive resort.

2. To subject intangible property to many more sources of taxation than other wealth prejudices its relation to other investments and other wealth by a discrimination which has no basis in the function that intangibles perform for our present society.[15] Intangibles, except for government issues, are an outgrowth of our modern corporation system. Of relatively recent growth, the corporation has become almost the unit of organization of our economic life. Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the state itself. Except for the easy circulation and ready acceptability of pieces of paper characterized as stocks or bonds, this existing system could not function. It is these intangible symbols or tokens which give liquidity and mobility to otherwise fixed underlying plant assets, which give ready negotiability to fractional interests therein that would otherwise transfer with difficulty, and which divide among many both benefits and risks from aggregation of properties whose successful functioning for society requires unified management of the bulk. The amount of plant and material and goods in process, working capital, good will, and organization at any time devoted to enterprise substantially will depend

[15] The burdens imposed by the present decision are cumulative and must be considered in relation to taxation of intangibles in some circumstances by states other than that of domicile (Curry *v.* McCanless, 307 U. S. 357; Graves *v.* Elliott, 307 U. S. 383) and also in reference to the closing of the federal courts to both state and taxpayers where different state courts make inconsistent findings on domicile resulting in estate taxation by two or more states. Massachusetts *v.* Missouri, 308 U. S. 1; Texas *v.* Florida, 306 U. S. 398; Worcester County Trust Co. *v.* Riley, 302 U. S. 292; New Jersey *v.* Pennsylvania, 287 U. S. 580; Dorrance *v.* Pennsylvania, 287 U. S. 660 and 288 U. S. 617, certiorari denied to review Dorrance's Estate, 309 Pa. 151; Hill *v.* Martin, 296 U. S. 393; Dorrance *v.* Martin, 298 U. S. 678, certiorari denied to review Dorrance *v.* Thayer-Martin, 116 N. J. L. 362; Sargent and Tweed, Death and Taxes are Certain—But What of Domicile?, 53 Harvard Law Review 68; cf. Treines *v.* Sunshine Mining Co., 308 U. S. 66.

upon the willingness of the public to stand in the position of stockholder or bondholder. When this Court determines that the effect of owning this type of circulating medium is to subject the estate of the owner to an inheritance tax from every state that chartered one of the companies in which he has invested, it imposes a handicap on such ownership that is substantial and influential upon our economy.

Not one substantial evil is said by the opinion in this case to flow from the rule being upset, and evils of some magnitude admittedly follow from the one being reinstated. These consequences the Court declines even to consider, although they bear upon a segment of our economy bigger than the national debt[16] and affect more persons than are now in the armed forces.[17] Intangibles constitute well above 50% of all property transferred by death[18]

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[16] U. S. Treasury Statistics of Income for 1938, Part II, p. 4 (latest available) shows that 520,501 corporations filed returns. 169,884 of them reported net income aggregating $6,525,979,257, while 301,148 reported an aggregate loss for the year of $2,853,097,727.

The Commissioner computes dividends paid in cash or assets other than stock to have been $5,013,432,827. *Id.* at 22.

Balance sheets were submitted by 411,941 corporations showing total assets of $300,021,727,000. *Id.* at 28.

The volume of intangibles afloat as a result of corporate financing is not specifically calculated, but some idea of it is gleaned from the aggregate of items as follows:

Common stocks	$74,791,662,000
Preferred stocks	18,108,066,000
Bonds, notes and mortgages— maturity 1 year or more...	56,278,233,000 *Ibid.*

[17] I know of no accurate calculation of the number of persons who hold stocks or bonds. Many estimates are extravagant and include an enormous amount of duplications—for example, the aggregate of stockholders' lists of all corporations. I think the estimate of Berle and Means as of 1927 that between four and six million persons owned stocks, including an estimated two million employee or customer stockholders, is a reasonable one. The Modern Corporation and Private Property (1934) 374. Many are, of course, also bondholders, and the number to be added after allowing for duplication is difficult to estimate. It must also, of course, be borne in mind that this includes many very small holdings and that such statistics are of little value in considering the relative benefits from such holdings derived by those in different income brackets.

[18] United States Treasury Statistics of Income for 1938, Part I, p. 220, shows that 15,221 estates filed returns showing total gross estates of $2,746,143,000, of which real estate was $433,487,000, tangible personal property, $34,637,000, and intangible personal property $2,278,019,000.

The intangibles so reported included:

Capital stock in corporations	$1,079,231,000
State and municipal bonds	242,537,000
Government bonds	148,802,000
Other bonds	164,796,000

Of course it does not follow that the same proportions hold good for estates too small to be reported under federal law. Because they would be more

and an even greater proportion of that transferred by gift, which I assume is equally vulnerable to this tax[19] The gravity of subjecting such extensive interests to complex, confusing, and overlapping tax jurisdictions should be weighed against the reasons advanced for the change.

The revenue that the states may collect in consequence of this decision is not the measure of the burden it imposes on taxpayers. The ascertainment of taxes of this type is costly and wasteful. Such taxation frequently requires taking out ancillary letters in the state of the corporation's domicile, the hiring of local counsel, the furnishing of affidavits to local probate courts and inheritance tax officials, and the payment of various fees, costs, and expenses. For the assurance of local creditors, bonds are sometimes required and long kept in force. Realization upon assets and distribution of estates is delayed by inability to get waivers or consents to transfer until after extensive proceedings have been conducted. The seriousness of these burdens is increased if the decedent owns stock in consolidated corporations incorporated in several states, and under this decision stocks of some consolidated railroads would be subject to tax on their full values by five or six states. One need not be unduly soft-hearted towards taxpayers to doubt whether the exhaustion of estates through multiplication of reports, returns, appraisals, litigation, counsel fees, and expenses ultimately makes for a sound fiscal policy or an enlightened social policy.

Moreover, the burdens imposed by this type of taxation are unequal and capricious and in inverse order to the ability of the estate to pay. I suppose we need have little anxiety about Mr. Harkness's $87,000,000 net estate with its $1,000,000 investment in Union Pacific stock. As we have pointed out, it is not he, but the State of New York, that will pay this tax to the State of Utah. And if New York had no provision in its statutes for credit and Mr. Harkness could have foreseen the shift of position of this Court, it is not likely that he would have been caught with the tax.

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heavily weighted with farm and home owning, I am confident these statistics do not present proportions applicable to all transfers by death. They do, I believe, sustain the statement made in the text.

[19] United States Treasury Statistics of Income for 1938, Part I, p. 264, show total gifts reported for taxation as—

Real Estate	$41,241,000
Stocks and Bonds	214,583,000
Cash	72,390,000
Insurance	21,795,000
Misc.	49,764,000

Those who have large estates and watchful lawyers will find ways of minimizing these burdens. But Mr. Harkness is not a typical Union Pacific stockholder. In 1939, the Union Pacific had 50,131 stockholders.[20] The many small stockholders cannot afford professional counsel or evasion devices. The burden of reports and appraisals and foreign tax proceedings bears heavily upon them because of the relatively small amount involved in their transfers. The new tax we have authorized undermines the principle of graduation of tax burdens in proportion to ability to pay. No tax laid on anything less than the total net worth of the estate can be graduated even roughly according to the principle which progressive modern taxation strives to heed. The imposition of unpredictable assessments from many sources makes it impossible for the state of domicile to make intelligent use of its own taxing power as an instrument of enlightened social policy. Chaos serves no social end.

3. A large majority of the states by experience prior to the *First National Bank* v. *Maine* decision found the system of taxation which this Court imposes on all states today to be unworkable and to constitute a threat to the death tax on intangibles as a state source of revenue. Competitive use by the states of death taxation and immunities invited federal invasion of the field, one phase of which was the enactment by Congress of § 301, Revenue Act of 1926, sustained by this Court in *Florida* v. *Mellon*, 273 U. S. 12. There the Federal Government had laid an estate tax, but retained only 20% of the revenue and used an 80% credit provision to equalize the demands of the states. There was an uneasy premonition among the states that overlapping, capricious, and multiple taxation would lead to federal occupation of the field. Appearing in the *First National Bank* case as *amicus curiae*, the New York State Tax Commission urged that both principle and policy prevent the levying of taxes by more than one jurisdiction, and added: "The New York Tax Commission believes that the present is a crucial period in the development of death taxation in this country and that a false step may make it difficult for the states to retain the death tax as a source of substantial revenue." We revive their difficulties.

Farsighted states saw that the total revenue resources practically available to the states was not increased by overlapping their taxation and invading each other's domiciliary sources of taxation.

[20] Moody's Steam Railroads (1940) 888.

Many felt that justice required credits to their own domiciled decedents' estates for taxes exacted elsewhere, and the credits granted offset largely the revenue derived from the tax. The multiple taxation added substantially to the cost of administration and to the annoyance of taxpayers. Because of these considerations, at the time of argument of *First National Bank* v. *Maine*, thirty-seven states had enacted reciprocity statutes which voluntarily renounced revenues from this type of taxation. The Court was urged to stay the hand of sister states which would not cooperate. The restraint laid by this Court in response to those appeals is now withdrawn at the behest of a state which has at no time enacted a reciprocity statute or given a credit for such taxes paid by its domiciled decedents elsewhere. We have not heard the views of any other state nor considered their concern about retaining the source of taxation opened to them. I do not doubt that today's decision will give a new impetus to federal absorption of this revenue source and to federal incorporation of large enterprises.

4. An unfortunate aspect of this decision is that in common with other judge-made law it has retroactive effect. Consequently, inequalities and injustices will be suffered by states as well as by individuals. For example, the State of New York has written into its own Constitution the limitations on its taxing power which this Court had established by the decision we now overrule.[21] Until it can adjust its constitutional provisions, such a state may not take advantage of the tax privileges the Court confers today, although other states may do so. We have not been advised as to the number of states which have repealed or modified reciprocity or credit provisions in their own statutes or constitutions in re-

[21] Article XVI, § 3 of the New York State Constitution, adopted in 1938, provides:

"Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

That decision apparently ended the necessity for reciprocal exemption and I know of none enacted since. Texas and Missouri appear to have omitted reciprocal exemption provisions in later revisions of their inheritance tax laws.

liance upon the decision we overrule. Credit provisions contained in statutes may be the foundation for claims for refund against domiciliary states as chartering states proceed to take advantage of the privilege of retroactive taxation accorded them by this decision. Estates closed and distributed under existing laws become indebted by force of this decision to chartering states on claims for transfer tax that may have existed in the state statutes but had never been suspected of having constitutional validity. For what periods these claims may have vitality depends on state statutes of limitation. Whether personal liability may be asserted against executors and administrators for failure to pay taxes that our decisions did not tolerate at the time the estates were closed likewise depends on the laws of the chartering states. With confidence we may anticipate that this decision will produce much confusion, some controversy between the states, and a lusty crop of litigation.

III.

The Court casts aside former limitations on state power to tax nonresidents in such terms as to leave doubt whether any legal limitations are hereafter to be recognized or applied. The opinion of the Court says that the state may "constitutionally make its exaction" "which can demonstrate 'the practical fact of its power'." The concurring opinion adds that "Each State of the Union has the same taxing power as an independent country, except insofar as that power has been curtailed by the federal Constitution" and it enumerates three limitations, each of which prohibits a kind of tax or protects kinds of business from tax, but none of them restrains taxation by reference to what we have usually expressed by "jurisdiction". It is true that the concurring opinion says that "the Due Process Clause has its application to the taxing power of the States" but we are not told what it may be, and it is difficult to conceive of a situation where it will ever be useful if it may not be considered as a test of jurisdiction to impose a tax.

Despite today's decision, I trust this Court does not intend to say that might always makes right in the matter of taxation. I hope there is agreement, though unexpressed, that there are limits, and that our problem is to search out and mark those limits. One way to go about it is to say that those states can tax which have the physical power to do so and have conferred some benefits or protection on the taxpayer. Of course there is nothing in the

Constitution about this, but that is a criticism that can be directed at any test that I can think of. My difficulty is that on its face—and as so far applied—this test comes out to the point where might does make right. For in a very real sense every state and territory in the Union has conferred very real benefits upon every inhabitant of the Union. Some states have seen to it that our food is properly produced and inspected; others have fostered and protected the industry upon which we are utterly dependent for the ordinary conveniences of life and for life itself. All of them have yielded up men to provide government at home and to repel the enemy abroad. I am the very real debtor, but am frank enough to say ~~that~~ I hope not a potential taxpayer, of all.

Certain it is that while only corporate stock is expressly mentioned in the opinion or involved in the judgment today, the fiction of benefits and protection is capable of as ready adaptability to other intangible property. Our tomorrows will witness an extension of the taxing power of the chartering or issuing state to corporate bonds and bonds of states and municipalities (by overruling *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204), to bank credits for cash deposited (by overruling *Baldwin* v. *Missouri*, 281 U. S. 586) and to choses in action (by overruling *Beidler* v. *South Carolina*, 282 U. S. 1). And while today the Court sustains only a death transfer tax, its theories are equally serviceable to sustain an income or excise tax on dividends from such stock or interest on bonds or a sales tax, or a gift tax. Whether each chartering or issuing state will be permitted to calculate its tax on some formula that will consider the total property owned by the decedent, I do not know, but in the present trend of decision there is little restraint on such formulas. I therefore take today's decision to mean that any state may lay substantially any tax on any transfer of intangible property toward which it can spell out a conceivable legal relationship.

And since the Due Process Clause speaks with no more clarity as to tangible than as to intangible property, the question is opened whether our decisions as to taxation of tangible property are not due to be overhauled. And if the State of Utah is not denied jurisdiction over the transfer of this stock owned by a New York resident it is difficult to see where the Court could find a basis for denying it jurisdiction to prescribe the rule of succession to it.

The Court, it seems to me, will be obliged to draw the line at which state power to reach nonresidents' estates and extraterritorial transactions comes to an end. I find little difficulty in concluding that exaction of a tax by a state which has no jurisdiction or lawful authority to impose it is a taking of property without due process of law. The difficulty is that the concept of jurisdiction is not defined by the Constitution. Any decision which accepts or rejects any one of the many grounds advanced as jurisdictional for state taxing purposes[22] will read into the Constitution an inclusion or an exclusion that is not found in its text. To read into the Constitution the Court's present concept of jurisdiction through charter granting, and to hold that it follows that the Constitution does not prohibit this tax, is to make new law quite as certainly as to adhere to the concept of jurisdiction according to the decedent's domicile and to hold that the Constitution therefore does prohibit it.[23]

I am content with existing constitutional law unless it appears more plainly that it is unsound or until it works badly in our present day and society.

Mr. Justice ROBERTS concurs in this opinion.

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[22] See Lowndes, State Taxation of Inheritances, 29 Michigan Law Review 850; Hine, Situs of Shares Issued under the Uniform Stock Transfer Act, 87 University of Pennsylvania Law Review 700.

[23] But fear of legislating need not intimidate those of either view. The necessity of eventually finding some jurisdictional basis for state action affecting non-residents presents a problem similar to that stated by Mr. Justice Holmes in Southern Pacific v. Jensen, 244 U. S. 205, 221: "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motion." And another candid jurist has said: "I will not hesitate in the silence or inadequacy of formal sources to indicate as the general line of direction for the judge the following: that he ought to shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question." Cardozo, The Nature of the Judicial Process (1932) 120.

Where prescribed sources of law fail to guide the judicial process, the Swiss Civil Code provides that the judge "must pronounce judgment according to the rule which he would set up if he were legislator himself." Williams, Sources of Law in the Swiss Civil Code (1923) *et seq.*; Schoch, The Swiss Conflict of Laws, 55 Harvard Law Review 738, 749, note 57. The Swiss may have thought a candid recognition of what necessarily is the practice would forestall judicial disclaimer of responsibility for the practical consequences of law announced.